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A Brief History of the Reorganization

of

The New York, New Haven and Hartford Railroad Company

by

EDWIN S. S. SUNDERLAND

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A Brief History of the Reorganization

Under Section 77 of the Bankruptcy Act

of

The New York, New Haven and Hartford Railroad Company

1935-1947

by

EDWIN S. S. SUNDERLAND III

Privately printed—Not for public distribution

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY REORGANIZATION PROCEEDINGS

1935-1947

Preface

The following chapters contain a history, necessarily brief, of the important events of the twelve years of effort which brought about the reorganization of The New York, New Haven and Hartford Railroad Company.

They provide a case history of a single proceeding under Section 77 of the Bankruptcy Act, the federal railroad reorganization statute, which presented virtually every difficulty which can arise in the course of the rehabilitation of an enormously complex railroad organization. The record of the proceedings in the District Court, which it summarizes, fills twenty-one volumes. Thousands of pages of testimony were presented to the Interstate Commerce Commission. More than a thousand petitions were presented to the District Court in the course of the proceedings. Many of them raised questions of crucial importance to the administration and reorganization of the property. Fourteen of the Court's decisions were appealed to the Circuit Court of Appeals and six to the United States Supreme Court. The important provisions of the plan of reorganization were similarly litigated to the courts of last resort. Precedents have thus been established which will be of service in any future reorganization proceeding under Section 77 and in any attempt to simplify and reorganize a corporate railroad structure through any other statutory procedure.

The history also illustrates the problems and difficulties which confront the governmental authorities concerned and the parties in attempting to rehabilitate an important and complicated railway property under a new statute. While at times the adequacy of the mechanism which the statute placed at the disposal of the Commission, the Court and the parties will appear debatable, this history is not intended as an argument either for or against Section 77 of the Bankruptcy Act. It is hoped, rather, that any doubts which are provoked will lead to the evolution of just and workable means for railroad reorganization, sufficiently flexible to meet the exigencies of all cases. The history will also bring sharply to mind the new Section 20(b) added to the Interstate Commerce Act, by the so-called "Mahaffie Act", approved by the President on April 9, 1948, which was designed to grant greater freedom to the railroad and the parties in the adjustment of their responsibilities and claims. As the difficulties of the New Haven are reviewed, the question should recur—would these proceedings have

been shorter, more economical of time or expense and more effective had that act been available to the parties?

The reader of this history cannot fail to gain certain salient impressions. The first must be, that the proceeding was an extraordinarily lengthy one and that the absence of precedent for the application of the statute to the problems of the New Haven and the manner of their solution added to the difficulties. A second would be the large extent to which the public interest figured in the reorganization proceedings and the efforts that the parties made to settle and compromise their private difficulties with due regard for the maintenance of efficient railroad service. A third impression must be that the railroad, despite all the problems of the reorganization, was efficiently operated throughout this period of litigation and emerged from bankruptcy in splendid physical condition and with many operating improvements.

The fact that the reorganization of the New Haven took approximately twelve years (October 23, 1935-September 18, 1947 inclusive) and that the reorganization of other railroads, having perhaps fewer, but certainly generally similar problems to those present in the New Haven reorganization, took even longer (*Frisco* 1933-1946; *Rock Island* 1933-1947 and *Missouri Pacific* 1933-to date) cannot be put forward as, of itself, a valid criticism of the adequacy of Section 77. Indeed the expedition of the Interstate Commerce Commission, the Federal Courts and the parties in interest in the case of several railroad reorganizations, such as the *Chicago Great Western* (1935-1941) and the *Erie* (1938-1941) reorganizations, emphasizes the importance of weighing the difficulties encountered in the particular railroad reorganization before attempting any general criticism of the reorganization process based only on the length of time required for railroad reorganizations under the Bankruptcy Act. It must be borne in mind that Section 77 was passed in 1933, at the depth of a country-wide depression. Though several railroads immediately availed themselves of the statute, little progress counted in terms of railroad reorganization plans put forward resulted. This was in part the result of prevailing economic conditions and in part the result of fundamental deficiencies in the Act which were appreciated even prior to the initial judicial test of the legislation. The amendments to Section 77 relating to the enforcement of approved plans over the opposition of minorities were adopted in 1935 and remedied many of these defects. The New Haven reorganization began shortly after the adoption of these amendments and vigorous efforts were made at once to work out a plan. No sooner had some of the fundamental problems with which a New Haven plan would have to deal, been revealed and a plan presented, than the economic recession of 1938 descended upon the railroads of the country and, with particular violence, upon the New Haven, rendering it apparent to the Interstate Commerce Commission's Examiner* and many of the parties that reorganization of the New Haven must, at

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* Report of Examiner Wilkinson, June 11, 1938.

least for the time being, be postponed, as was likewise true of other railroads in bankruptcy.

With improved earnings in succeeding years, the Commission was able to complete and put forward reorganization plans under Section 77 with respect to fourteen Class I carriers. The plans so presented involved readjustments of capital far more drastic than any recent reorganization in equity. In all but a few cases (notably the *Chicago & Eastern Illinois*, the *Chicago Great Western* and the *Erie*) the old stockholders were completely eliminated. In some cases, junior creditors were denied participation by reason of the greatly diminished capitalization which the Commission could find justified by past and projected operation and earnings of the railroad. The interest of the public that the capitalization of a railroad have a realistic relation to prospective earnings is not always apparent. Stocks reflecting merely remote hopes for future dividends command so low a market price that in the absence of a voting trust they are attractive to persons who seek a quick profit either through control of management of a property or other manipulation. Such stocks present a tempting target for speculators who are often more interested in such profits than in the maintenance of a sound railway system. These dangers received the official attention of the Secretary of Commerce in a communication to the Chairman of a subcommittee of the Senate on Interstate Commerce as reported in the Congressional Record, Vol. 90, pp. 3909, 3910. The then Secretary of Commerce, Hon. Jesse H. Jones, said in part:

> "It is well known that in the past many of our railroads have suffered from exploitation, and speculators are now active in cheap railroad stocks because of the large temporary earnings made possible by the war. These operators will bear watching, particularly with respect to roads which come out of bankruptcy with low-fixed charges. Such roads are easy prey for manipulators. There can, of course, be no objection to investors buying cheap stocks, but any movement to manipulate a railroad for the personal profit of its officers or directors should not be allowed, even if it requires legislation to prevent it."

Another factor which contributed to the prolongation of reorganization cases under Section 77 was the impact of the dramatically improved earnings of the nation's railroads as a result of the wartime traffic. With practically every carrier's revenues soaring to heights never before attained, it is no wonder that it was strenuously contended that the Commission, in finding those railroads' common and preferred stocks without value, had grossly underestimated the earning power of the bankrupt railroads. These pleas of inequity presented novel and important questions for decision by the courts. Because of the serious financial consequences involved, these issues relating to the total capitalization, required careful and lengthy deliberation by the courts to which they were progressively

presented for a determination, with the delay which is a necessary concomitant of such litigation.

The initial plan of the Commission for the New Haven presented all the difficulties attendant on a drastic reduction of capital in the public interest. There was also the additional and difficult problem of the disposition of the leased lines at the eastern end of the system. In approaching the solution of the problem of its leased lines the New Haven reorganization touched upon a most sensitive area of the public interest in continued transportation service. The "East End" lease problems were ultimately solved, so far as concerned the provisions of the New Haven Plan, through the efforts of the Commission, the District Court and the "Compromise Committee" appointed by the Court. Recognizing from the sharp conflict between representatives of the Commonwealth of Massachusetts and the representatives of the New Haven and other creditor interests at the hearings on the Plan in June, 1941 that a satisfactory solution of the problem of protecting the New Haven from the results of operations on the East End lines and, at the same time providing the system service which the public interest demanded, would require concessions on both sides, the District Court, on June 3, 1941, designated the Compromise Committee, consisting of representatives of the Commonwealth, of the Debtor and of the principal New Haven creditor and principal Old Colony interests. This Committee succeeded in adjusting the differences of the parties in a business-like manner and provided a workable formula by which operations over the Old Colony lines would be continued for a test period. Its later work, in April 1942, provided the basis for the inclusion of the lines in the system. The solution proposed by the "Compromise Committee" was a genuine compromise, which asked considerable sacrifices of the New Haven creditors in order to continue the Old Colony operations in the public interest and in return offered them provisions limiting the amount of losses which they must absorb and providing an increased voting power for the Preferred Stock which was to pass, in large part, to the New Haven secured creditors. Whether the latter provision for the protection of the New Haven creditors against the risks involved in the merger of the Old Colony will give the protection intended, can only be answered by future events.

Adjustments such as these are the real achievements of any reorganization. The work of the "Compromise Committee" is thus a practical illustration of the desirability of specifically incorporating in the law a concept of reorganization which has long been advocated by those most familiar with the problems inherent in the railroad reorganization process, namely, the usefulness of equitable compromises under the supervision of the Commission and the Federal Court. In the other recent railroad reorganizations, agreements among the parties have also been important. The efforts by the parties, the Commission and the Courts in the *Frisco*[1] and *Seaboard*[2] reorganizations; in the *Central of Georgia*[3] reorganization;

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[1] Appendix C; Note 1.
[2] Appendix C; Note 2.
[3] Appendix C; Note 3.

in the *Erie*[4] reorganization; in the *Denver & Rio Grande Western*[5] reorganization and in the *Chicago Great Western*[6] reorganization, are examples of this desirable procedure. It is submitted, however, that the successful effort on the part of the Federal Court and of the "Compromise Committee" appointed by it in developing the compromise in New Haven was a significant contribution to establishing sound railroad reorganization procedure.

Even after a basis for inclusion of the Old Colony lines in the reorganized New Haven was worked out, both as to operation and as to the securities issuable for their purchase, neither the New Haven nor the other pending plans which were the subject of active litigation could go forward with confidence until the United States Supreme Court had ruled upon fundamental aspects of the powers of the Commission and the courts under Section 77 as amended in 1935. Such rulings were not available until March 1943, when the Supreme Court handed down its *Western Pacific** and *Milwaukee*** decisions. Nearly eight years had then elapsed since the New Haven went into bankruptcy but, for the most part, causes beyond anyone's control had blocked the path to prompt emergence from this unwelcome status.

Immediately after the decisions in the leading *Milwaukee* and *Western Pacific* cases, the New Haven Plan was announced by the Commission in its Fourth Supplemental Report of July 13, 1943 and in its Fifth Supplemental Report of February 8, 1944. These two leading Supreme Court decisions gave support to the principal features of the New Haven Plan both as to the principal debtor and the secondary debtors. The Plan was approved by the District Court on March 6, 1944 within a month of its promulgation by the Commission. Despite this the Plan was not consummated until September 18, 1947. The three years of delay were to an appreciable extent accounted for by extensive litigation over the terms of acquisition of the Old Colony lines. This litigation was predicated upon the theory that the work of the "Compromise Committee" was illegal under Section 77. That work, however, was approved by the Commission and, after three years of litigation in the District Court and in the Circuit Court of Appeals for the Second Circuit, received the tacit approval of the Supreme Court of the United States. Had it been established before this compromise agreement was reached that efforts of this character were to be encouraged rather than questioned or attacked, it is reasonable to assume that the New Haven reorganization proceedings would have been shortened by many years.

As a matter of fact, it had been recognized that the provisions of Section 77 might not provide for adequate participation by the Commission in

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[4] Appendix C; Note 4.

[5] Appendix C; Note 5.

[6] Appendix C; Note 6.

* *Ecker* v. *Western Pacific Railroad Company*, 318 U. S. 448 (1943).

** *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 318 U. S. 523 (1943).

the earlier stages of the development of the Plan among the parties. Following the 1935 amendments to Section 77, a general discussion of the Act, as amended and modified, was held before the entire Commission and participated in by many lawyers who had had large experience in railroad reorganization equity proceedings and were actively interested in several railroad bankruptcies then pending under the Act. At that time the desirability of active participation by the Commission through one of its Commissioners or an Examiner of the Commission in the initiation and during the development of a plan was earnestly urged. It was also suggested that every effort should be made on the part of the Commission, with emphasis on non-judicial procedure, to work out compromises with the parties which would expedite the development of railroad reorganization plans and lessen the period of time in which the railroad property would be under judicial and Commission control. In the New Haven proceedings, the parties were fortunate in that one Interstate Commerce Commissioner, Commissioner Charles D. Mahaffie, and one of the Commission's Examiners, Examiner Harvey H. Wilkinson, participated in all of the various phases of the proceedings throughout their long course. The thorough knowledge and familiarity of the Commissioner and the Examiner with the New Haven, their competent and expert handling of the proceeding and their complete knowledge of all the problems presented by one of the most complicated plans under Section 77, were of inestimable benefit not only in the correctness of their determinations but also in the expedition with which action by the Commission was thus made possible. As will be seen it was with the express approval of the Commission at the close of the February, 1942 hearings, that the Compromise Committee went on and developed terms for including the Old Colony in the reorganized company.

After the decision of the Supreme Court denying certiorari, in June, 1947, actual consummation of the New Haven Plan went forward. It should be a source of satisfaction to the Reorganization Committee of five, to whom this task fell, that the time required for the consummation of the New Haven Plan was the shortest time required for the consummation of the reorganization of a comparable Class I railroad. Not only was the consummation accomplished with great dispatch but, taking into account the quantity of new documents which were prepared, the economy of the Committee was noteworthy. Of the $432,528.75 estimated expenses of the Committee, authorized by the Interstate Commerce Commission, $205,923.95 was tax expense and $31,483.33 was the cost of listing the new securities on the New York and Boston Stock Exchanges. Of the remaining $195,121.47, which included the charges and expenses of new Mortgage Trustees, the Exchange Agent and other fiduciaries based on competitive bidding, amounting to $90,400, and $39,320 for unforeseen contingencies, approximately $85,000 is still unspent. The chief factor which contributed to this expedition was, of course, the knowledge and experience of a majority of the members of the Reorganization Committee and of its counsel with the New Haven and other proceedings. The Chairman of the Committee,

Mr. John L. Hall, had for a long time been a director of the New Haven. He was a member of and counsel to the New Haven Plan Committee. Prior to the bankruptcy, he had advised the New Haven as counsel on many important matters. The representatives of the large creditor groups on the Committee, notably Mr. James H. Brewster, Jr., who since 1935 had ably performed his duties as Chairman of the so-called Insurance Group, and Mr. Myron F. Converse, who likewise, as Chairman of the so-called Mutual Savings Bank Group, ably represented a large number of the principal New England Savings Banks, largely contributed to this result by reason of their thorough familiarity with the property and the Plan. To the Court's appointees, Professor Kent T. Healy, Professor of Transportation, at Yale University, and Mr. Allerton F. Brooks, President of the Southern New England Telephone Company, much credit is due for the fresh and informed point of view which they respectively brought to the work of the Reorganization Committee.

In selecting its counsel, to whom a great share of the work of the consummation of the reorganization plan would fall, the Committee decided to appoint a single firm to do the work despite the fact that two firms had acted in many other reorganizations of comparable size.* Knowing the need for speedy and economical consummation, the Committee thought it wise to choose a firm which could put at its disposal lawyers experienced in the wide variety of fields which the consummation would inevitably involve and which, in addition, had a thorough familiarity with the Plan, its background and the New Haven property. In the light of these requirements the Committee selected as counsel the firm of Davis Polk Wardwell Sunderland & Kiendl, which, over a period of more than fifty years, has had a long and varied experience in railroad reorganizations in equity as well as under Section 77 of the Bankruptcy Act.** This firm had represented the Insurance Group since 1935 and had actively participated in the legal steps which carried the Plan forward.

It cannot be over-emphasized that while all the difficult and, at times, extremely unusual problems of the reorganization were being considered and resolved, the property was being efficiently administered. Through the early spring of 1948, almost $33,000,000 was spent on improvement of roadway and structures, including track, signal and communication additions and improvements. Expenditures for equipment were $73,714,844, including the acquisition of almost 5,000 freight train cars, 257 Diesel locomotives and 420 passenger train cars. The importance of the addition of Diesel locomotives is indicated by the fact that the annual savings made possible by the use of this type of motive power, as compared with steam, may be well over $8,000,000. In addition to the equipment already delivered, 1,583 various pieces of equipment, including passenger train cars, freight train cars and more Diesel locomotives, in all costing $21,525,000

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* I. C. C. Report, May 5, 1948.

** Appendix C; Note 7.

are on order. During the reorganization, the total maintenance-of-way operating expenses of almost $197,000,000 permitted, in addition to other usual items, the laying of 166,567 tons of new rail and the laying of 3,630,000 new ties. The financial side of the administration of the property was not neglected. Interest paid on old debt totalled $106,717,812, exclusive of $5,570,348 in interest paid on equipment trust certificates. In addition to this large sum in interest paid, a total debt reduction, divided almost equally between payments on general debt and payments on equipment trust debt, of $77,119,550, was made. These were notable achievements indeed in difficult times.

It is fortunate that among the Trustees, as the principal operating member, was the President of the railroad, Mr. Howard S. Palmer, who had come up through the ranks, beginning in the Accounting Department and moving through various positions of growing responsibility. Mr. Palmer —with his background of experience—also had the advice, first of his co-trustees, Professor Winthrop M. Daniels, who held the Chair of Transportation at Yale University, and Mr. James Lee Loomis, President of the Connecticut Mutual Life Insurance Co. The latter, by reason of being a native of the State and familiar, through his Company's large financial interest in the New Haven, with the financial aspects of the matter, was enabled to bring to the administration of the Trustees a specially helpful view in this field. Upon Professor Daniels' retirement, and in order that the so-called "Eastern End" of the property might have the benefit of a trustee with knowledge of its problems, Mr. Henry B. Sawyer of Boston, formerly a member of the firm of Stone and Webster, was appointed to succeed him. As abundantly appears even in the following brief history, the handling of the many and varied problems of administration required not only the special knowledge and experience that Mr. Palmer was able to contribute, but the expert advice of his co-trustees in their several fields as well as the able assistance of George T. Carmichael, Vice President and Executive Assistant. As Counsel in charge of the reorganization proceedings the Trustees had Mr. William M. Meyer, General Counsel, prior to his retirement, and later Mr. Hermon J. Wells, who, first as Assistant General Counsel and later as Vice President and General Counsel, with his competent staff, handled for the Trustees with great diligence and skill and understanding of the problems involved, the bulk of the litigation in the proceedings in the District Court and appellate courts.* It will appear

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* In the following chapters recounting the New Haven Reorganization and in Appendix A thereto, are to be found the names of the parties and the principal attorneys who acted for them. During the twelve and a half years of the reorganization, many of the attorneys who were active during the seven-year period prior to the outbreak of the war entered various military and civilian war services. Thus, individual recognition of these men and those who took their places, is particularly difficult. It is not known how many individuals participated in the work. The records of the Interstate Commerce Commission on the establishment of maximum allowances show that many of these firms were required to use a very large number of attorneys in order to perform their professional duties. Counsel for the Insurance Group and the Reorganization Committee, as the record before the Commission shows, have called upon some thirty

from this account that they were confronted with not only the daily operation of the railroad but also the expeditious solution of the many problems represented by a variety of interests, including the disposition of steamship and street-car lines, which required a great deal of time and expert attention.

During these twelve years there was frequent comment as to the able manner in which the Trustees had performed their services. Indeed, most of the parties and public authorities have been commendatory of the unusually able and efficient activities not only of the Court but of the Trustees under whose supervision the property was dealt with and operated. Recognition of Mr. Palmer's abilities in these respects was given at the conclusion of the reorganization by his election as President of the Reorganized Company.

This introduction and recital of the factors which made the task of the parties easier and the administration of the property more efficient would not be complete without recognition of the tremendous part played by the District Judge, Hon. Carroll C. Hincks. An enormous burden of litigation, much of which was vital to the development of the Plan and of the administration of the property, was disposed of with a fine and sensitive regard for both the public interest and the rights of those endeavoring to salvage their investments in the New Haven. The multifarious problems of the reorganization of the New Haven met at the hands of Judge Hincks a unique degree of understanding and ingenuity in their solution and these rare judicial qualities were always displayed in an atmosphere of courtesy to, and patience with, the representatives of the contending interests.

EDWIN S. S. SUNDERLAND.

New York, N. Y., June 15, 1948.

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attorneys from their staff, including specialists in particular fields and, similarly, other firms involved have called upon a large number of attorneys in their respective offices whose names do not appear in the text or in the schedule. The record, however, clearly shows the very able and expert way in which the attorneys, listed and not listed, have performed unusually difficult and important professional services. These services required not only unusual expertness in this technical field, but unusual willingness to put aside other professional work and personal convenience for long periods in order that the New Haven work might be accomplished with dispatch.

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THE NEW HAVEN REORGANIZATION.

CHAPTER I.

THE NEW HAVEN IN BANKRUPTCY.

The reorganization proceedings of The New York, New Haven and Hartford Railroad Company were inaugurated October 23, 1935, when the Company filed its petition in the United States District Court for the District of Connecticut, stating that it was unable to meet its debts as they matured and that it desired to effect a plan of reorganization in accordance with the provisions of Section 77 of the Bankruptcy Act. With this step another railroad, felled by the declining earnings which were a current product of the country-wide depression, sought recourse in the courts for relief from its financial burdens. By that time seven or more of the nation's Class I railroads were already in receivership or bankruptcy reorganization and more were to follow. The financial difficulties of the New Haven had been adequately forecast in its earnings record for the preceding year; yet it was something of a shock to find a railroad whose securities had at one time been known as reliable trust fund investments hastening to the judicial shelter.

The New Haven's petition showed that it had falling due between the date of the petition and January 1, 1936, taxes, debt maturities, interest, leased line rentals and guaranties totaling over fifteen and one-half million dollars. On the other side of the ledger, the Company had a cash balance of only a little over three million dollars, and estimated its total cash receipts from all sources during the remainder of the year at just over twenty-one and one-half million dollars. Since its necessary operating expenditures for the remainder of the year, it was estimated, would exceed eighteen and one-half million dollars, the Company would have available to meet its maturing obligations a little less than six million dollars. In the face of this precarious financial position of the New Haven, the Federal District Court Judge, Honorable Carroll C. Hincks, who was to live with the case for over twelve years, granted the New Haven's petition on the day that it was filed and entered Order No. 1 approving the petition and making provision for the continued operation of the New Haven's properties, leased and directly owned, and the continued conduct of all phases of its business subject to the jurisdiction of the Federal Court.

This action of the New Haven in petitioning for reorganization placed under the jurisdiction of the Connecticut Federal District Court the most important and extensive railroad properties in New England. As their history shows, they were the outgrowth of a natural expansion of trans-

portation facilities inspired by the economic development of New England and of an unwarranted expansion program in nearly all fields of transportation which resulted in piecing together the New Haven system and its widespread interests over the years. This growth had not gone unnoticed. The development and influence of the New Haven was investigated by the Interstate Commerce Commission on two earlier occasions; it has been discussed in many magazine articles, considered in Congress and even recounted at some length in a biography of an outstanding American jurist.* It has also been the subject of vigorous governmental attack for its tendency to spread its influence into all fields of transportation in the area which it served, by the Anti-trust division of the Department of Justice on several occasions.** To attempt to portray the entire saga of the New Haven would of itself require an extended discussion which, while historically interesting, would have no pertinence in so far as the reorganization proceedings are concerned. However, in order to have some understanding of the problems which this petition in bankruptcy brought forward for solution, it is essential that a brief sketch of the New Haven's corporate history and a survey of its properties be given.

The New Haven Proper.

The New York, New Haven and Hartford Railroad Company originated from the consolidation on August 6, 1872, under the laws of Connecticut and Massachusetts, of The New York & New Haven Railroad Company and the Hartford & New Haven Railroad Company.*** Later the consoli-

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* *The New England Investigation*, 27 I. C. C. ~~350~~ 560 (1913); *Financial Investigation of N. Y., N. H. & H. R. R. Co.*, 31 I. C. C. 12 (1914); *Investigation of the N. Y., N. H. & H. R. R. Co.*, 220 I. C. C. 505 (1937); "*Charles S. Mellen: Railroad Organizer*", Review of Reviews, August 1907; "Betraying New England", New England Magazine, March 1913; *Financial Transactions of The New York, New Haven & Hartford Railroad Company*, 63rd Cong. 2nd Sessions, Sen. Doc. No. 543; *Brandeis, A Free Man's Life*, by Alpheus Thomas Mason.

** The Department of Justice filed its petition in the District Court of the United States for the Southern District of New York alleging a violation of the anti-trust laws on July 23, 1914, and a consent decree was entered providing for the divesting of the New Haven's interest in The Boston & Maine R. R. Co., and numerous trolley companies. However, delay in complying with the edict was so great that finally on November 25, 1925 the decree was modified to such an extent that it might as well have been set aside (cf. 220 I. C. C. p. 508).

*** The following are some of the companies which have since been merged effective upon the dates named, and their outstanding obligations assumed: The Stamford and New Canaan R. R. Co., Oct. 1, 1890; the Hartford and Connecticut Valley R. R., Dec. 21, 1892; the New York, Providence and Boston R. R., Feb. 13, 1893; the Company for Erecting and Supporting a Toll Bridge from New Haven to East Haven, Union Wharf Company in New Haven and the Contractors to Rebuild and Support Union Wharf and Pier in New Haven, Oct. 18, 1895; the Shore Line Ry., March 18, 1897, the Housatonic R. R., March 28, 1898; the Shepaug, Litchfield and Northern R. R., July 9, 1898; the Danbury and Norwalk R. R., Oct. 26, 1905; the Providence and Springfield R. R., Oct. 30, 1905; the Rhode Island and Massachusetts R. R. of Rhode Island, Nov. 3, 1905; the Woonsocket and Pascoag R. R., Nov. 3, 1905; the Middletown, Meriden and Waterbury R. R., Nov. 3, 1905; the New Haven and Derby R. R., Nov. 3, 1905; the Rockville R. R., Nov. 6, 1905; the Colchester Ry., Dec. 16, 1905; the Naugatuck R. R., Jan. 31, 1906; the Providence Terminal Co., Dec. 29, 1906; the Boston and New York Air Line R. R., Jan. 30, 1907; the Pawtucket Valley R. R., Feb. 5, 1907 and Manufacturers & R. R., April 30, 1907.

dated corporation was also incorporated under the laws of Rhode Island (May 17, 1893).

The New York & New Haven Railroad Company was chartered in Connecticut in 1844, authorized to operate in New York in 1846, and its railroad operations began in 1849, approximately one hundred years ago. The main line extended between the cities named in the title of the corporation. The New Haven secured its entry into New York City by an agreement dated March 17, 1848, and the agreement of July 24, 1907, modified on November 10, 1913, which gave it a perpetual right to use the New York and Harlem Railroad's tracks from Woodlawn to Grand Central Terminal in the City of New York and to use and occupy the Grand Central Terminal up to fifty per cent of its capacity. The Hartford and New Haven Railroad Company was already chartered in Connecticut, having obtained its franchise in 1833, and its railroad operation began in 1839, ten years before that of the other partner to the consolidation. As its name implies, the railroad was to operate between New Haven and Hartford, Connecticut. The Massachusetts portion of the road was built by the Hartford and Springfield Railroad Corporation under a charter granted in 1839, although the track was not completed until 1844. Lastly, the New Haven's principal Rhode Island lines were acquired when the New York, Providence and Boston and the Shore Line Railway Company were merged in 1893 and 1897, respectively. To complete its through route to Boston, the Boston and Providence Railroad Corporation was leased in 1893 when the New Haven took over the Old Colony lines and that company's lease of the Boston and Providence. Such was the origin of the basic railroad lines which constitute the backbone of the New Haven system extending from New York to New Haven and from the latter city branching out in two directions, one north through Hartford, Connecticut, to Springfield, Massachusetts, the other northeast through New London, Connecticut, and Providence, Rhode Island, to its terminus in Boston.

The Company also had important holdings in street railway and bus lines, having extended its transportation interests widely into this field through its stock control of various local transportation companies. Not content to control transportation on land, the aggressive management of the system extended the Company's operations into several steamship properties and lines. When the New Haven's reorganization proceedings commenced the latter properties were insignificant in relation to the system's railroad operation, if not for the most part abandoned. However, certain of the Company's surface transportation lines did constitute valuable and profitable adjuncts to the system.

The New Haven's Lessors.

The New Haven also controlled by lease several lines of railroad, some important, others insignificant. Its leases included those of the following companies: Holyoke & Westfield Railroad Co., Providence &

Worcester Railroad Company, Old Colony Railroad Company (which in turn was lessee of Boston and Providence Railroad Corporation, and Providence, Warren & Bristol Railroad Company), Norwich & Worcester Railroad Company, Chatham Railroad Company, Connecticut Railway and Lighting Company and Hartford & Connecticut Western Railroad Company.

The lease most important to the New Haven was that from the Old Colony, primarily because of its position as lessee of the Boston and Providence Railroad Corporation. The Old Colony was incorporated on March 17, 1872 under a Special Act of the General Court of Massachusetts. It owned over five hundred miles of road radiating through southeastern Massachusetts and extending into southern Rhode Island. It was the principal commuter line for the City of Boston, and served the entire Cape Cod area. The Boston and Providence is a consolidation or merger of two older corporations, authorized by an act of Rhode Island's legislature on June 16, 1853, and an act of Massachusetts, of March 11, 1927. Its lines are the New Haven's most important connecting link between the cities of Boston and Providence, constituting part of the main line from New York to Boston. The New Haven had leased the Old Colony's properties, including its leasehold interests in the Boston and Providence and Providence, Warren & Bristol Railroad Companies, in 1893, at a rental equal to 7% per annum on Old Colony's capital stock plus bond interest, taxes and the payments required under the other two leases which, for the Old Colony, totalled $2,512,641 when the Old Colony lease was disaffirmed. The lease of the Boston and Providence, extending for a term of ninety-nine years from April 1, 1888, required payments of $400,000 as an annual rental, plus bond interest, taxes, and $3,000 for organization expenses. The annual rental payable in respect of the Boston and Providence just prior to rejection of this lease in 1938 amounted to $511,500.

The other Old Colony lessor, Providence, Warren and Bristol Railroad Company, was formed in Rhode Island on November 16, 1854. Its main line of only 14 miles extended from India Point, Providence, to Bristol, Rhode Island, and was leased to Old Colony for a term of ninety-five years and nine months at an annual rental equal to $6 a share on its capital stock, plus interest on indebtedness, taxes and organization expenses.

Of its other leases the New Haven was eventually to assume the three which its operating officers, and the Interstate Commerce Commission, deemed important to the transportation system, namely, those from the Providence & Worcester, Holyoke & Westfield, and Norwich & Worcester Railroad Companies. The first-mentioned company, incorporated under the laws of Massachusetts, November 25, 1845, as a consolidation owns an important line between the cities for which it was named. Its property is leased to the New Haven at an annual rental of $426,868 plus all taxes and assessments against the property and stock of the lessor. The Holyoke & Westfield is proprietor of a line only ten miles in length but which serves

a useful purpose to the system. It had been incorporated under the laws of Massachusetts on August 31, 1869, but its road was not opened for operation until 1879. The New Haven became its lessee in 1910 when the New Haven & Northampton Railroad Company which held a lease in perpetuity from December 3, 1870, was merged with the New Haven. The oldest of the New Haven's lessors is the Norwich & Worcester, which was incorporated under the laws of Connecticut and Massachusetts on June 22, 1836 as a consolidation of the Boston, Norwich & New London and Worcester & Norwich Railroad Companies. Its main track of seventy miles was leased to the Boston & Hartford and Erie Railroad on February 9, 1869 for 100 years at an annual rental equivalent to 10% (subsequently reduced to 8%) on its preferred stock plus interest on its bonds, taxes, and organization expenses. This lessee's interest passed to The New York and New England Railroad Company which eventually merged with the New Haven.*

With this network of wholly owned and leased lines, as of December 31, 1936, the New Haven operated over three thousand miles of track, over two thousand miles of which was main track and the remainder yard track and sidings. The system was truly a web covering Connecticut, Rhode Island, southern and southeastern Massachusetts and extending into southeastern New York.

This, then, was the background of the physical properties of the bankrupt company at the inception of the proceedings. Its financial history is equally worthy of note. The Company had paid dividends on its common stock regularly until September 1913 when all payments were discontinued. Thereafter no distributions were made until 1928 when two dividends were declared and dividends were continued during 1929, 1930 and 1931 after which they ceased. Dividends on the preferred stock, which was issued in 1927,** were paid from 1928 through April of 1932 and thereafter were allowed to accumulate. The dividend policy of the Company was a direct consequence of its results of operation. In the period between 1927 and the filing of the petition, the debtor's gross operating revenues had steadily declined, from a high of over $143,000,000 in 1926 to $69,283,110 in 1934. Faced with such a decline in revenues and with all its available assets pledged or mortgaged, it was inevitable that the Company would have to seek the relief afforded by bankruptcy proceedings. The Board of Directors realistically recognized this certainty and at a meeting held on October 23, 1935 authorized the filing of the Company's petition for reorganization.

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* The total annual rental payable by the New Haven under all its leases when the reorganization proceedings commenced was $5,081,140.

** The preferred stock was offered to common stockholders and holders of convertible debentures of '48 at the rate of one share for every four shares of common or each $400 of debentures.

CHAPTER II.

THE PROBLEMS OF THE NEW HAVEN REORGANIZATION AND THE POSITIONS OF THE PRINCIPAL PARTIES.

At the outset of a review of the New Haven's reorganization proceedings it is important that there be presented and be understood the problems confronting the reorganizers of the New Haven. First of all, there was the paramount task of revamping the capital structure so as to lighten its burden of fixed charges which were not only consuming its operating revenues but were devouring its surplus. It was, therefore, essential to ascertain what fixed charges the Company could meet in bad times as well as in good and to construct a capitalization accordingly, with an eye to the maintenance of a proper ratio of debt to capital stock. Once a permissible capitalization had been ascertained, the second step would be to develop the participation of each class of creditors or stockholders in the new company's capitalization.

With an existing capital structure as complex as that of the New Haven this latter problem did not lend itself to prompt or simple solution. The Company was an amalgamation of many smaller roads. It had a large number of underlying mortgages, each of which had been formerly a first mortgage on one or more of the properties of the component parts of the system when those parts were separately operated and remained as a first mortgage divisional lien when its railroad was absorbed into the system. There were thirteen such issues totaling approximately $64,000,000 in principal amount, including bonds pledged and held in the Company's treasury.* This meant that a determination of the contribution to the system of the properties subject to the liens of these securities was necessary, primarily from the aspect of the system's earnings and secondarily from the point of view of factors such as strategic location, terminal advantages, and interchange facilities. Such a determination was required to appraise their worth to the system before allocating to the holders of divisional or other mortgage securities a participation in the reorganized company's new securities equivalent to that worth.

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* These were: Housatonic Railroad Company, 5% Fifty Year Consolidated Mortgage Gold Bonds—$2,819,000; New York and New England Railroad Company, Boston Terminal, First Mortgage Bonds—$1,500,000; Dutchess County Railroad Company, First Mortgage Bonds—$287,000; The New York, Providence and Boston Railroad Company, 4% General Mortgage Gold Bonds—$1,000,000; The New England Railroad Company, 4 and 5% Consolidated Mortgage Bonds—$17,500,000; The Naugatuck Railroad Company, First Mortgage 4% Fifty Year Gold Bonds—$2,500,000; Harlem River and Port Chester Railroad Company, First Mortgage 4% Fifty Year Gold Bonds—$15,000,000; Danbury and Norwalk Railroad Company, First Refunding 4% Mortgage Gold Bonds—$350,000; Boston and New York Air Line Railroad Company, First Mortgage 4% Fifty Year Gold Bonds—$3,777,000; Providence Terminal Company, First Mortgage 4% Bonds—$3,922,000; New Haven and Northampton Company, Refunding Consolidated Mortgage 4% Fifty Year Gold Bonds—$2,400,000; Central New England Railway Company, First Mortgage 4% Fifty Year Gold Bonds—$13,144,000.

The New Haven also had outstanding fifteen of its own issues, secured by its First and Refunding Mortgage, totaling almost $192,000,000 in principal amount, including those pledged and held in the Company's treasury.* This mortgage was, of course, only a second lien on the properties subject to the underlying mortgages, although a first lien on other properties. Again the problem was to resolve the participation of the securities issued under this mortgage in any plan of reorganization.

The Debtor had outstanding $16,758,000 of unsecured debentures and $15,302,600 of collateral trust bonds secured by $23,000,000 of First and Refunding Mortgage Bonds. The problem with respect to these issues was more easily dealt with since the former could only participate after all secured creditors had been dealt with and the latter could be treated on the basis of their collateral.

During the difficult years of the '30's, the New Haven had borrowed heavily from administrative agencies of the federal government. It was indebted on secured loans from the Railroad Credit Corporation, Reconstruction Finance Corporation, and Public Works Administration of almost $16,000,000. These loans were secured by collateral such as the common stock of the Old Colony and other leased lines, securities of New Haven subsidiaries and, to a limited extent, by the New Haven's own First and Refunding Bonds as well as by the New Haven's hotel and real estate property interests in the vicinity of the Grand Central Terminal in New York City. The Trustees' concern was not only with meeting the interest and principal of these obligations, but protecting the New Haven's rights with respect to such of this collateral as it deemed important from a dollar standpoint, as well as from the standpoint of retaining control of important parts of the system.

The Company had also borrowed heavily from various banks. Eleven banks in New York, Boston, Providence and Springfield held notes of over $16,000,000.** Important distinctions were necessarily to be made between these bank creditors because of the difference in the collateral which they held. For instance, The Merchants National Bank, Rhode Island Hospital Trust and Bank of Manhattan were secured principally by stocks of leased and subsidiary lines—the Old Colony, Boston and Providence and New York, Ontario & Western Railroad Companies. The value of the Old

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* These were: *Debtor:* 4% Debentures, $5,000,000; 3½% Debentures, $5,000,000; 6% Convertible Debenture Certificates, $39,028,300; 3½% Debentures, $10,000,000; 4% Debentures, $15,000,000; 3½% Debenture Certificates, $9,765,450; 4% Debentures, $15,000,000; *Consolidated Railway Company:* 4% Debentures, $4,255,000; 4% Debentures, $2,309,000; 4% Debentures, $1,340,000; 4% Debentures, $2,011,000; First and Refunding Mortgage 6% Gold Bonds, Series F, $23,000,000; First and Refunding Mortgage 4% Gold Bonds, Series E, $3,600,000; First and Refunding Mortgage 4½% Gold Bonds, Series of 1927, $31,000,000; First and Refunding Mortgage 6% Gold Bonds, Series of 1932, $25,516,000.

** These were: Irving Trust Company (New York), $2,350,000; National Shawmut Bank of Boston, $2,000,000; Bank of The Manhattan Company, $1,000,000; The First National Bank of Boston $4,200,000; The Merchants National Bank of Boston, $500,000; The Chase National Bank of the City of New York, $4,750,000; Second National Bank of Boston, $500,000; Rhode Island Hospital National Bank, $500,000; Union Trust Company (Springfield), $200,000; National Rockland Bank (Boston), $100,000; State Street Trust Company, $175,000.

Colony and Boston and Providence stock was subject to the decision of the Trustees with respect to acceptance or rejection of the leases of those railroads' properties. The value of the New York, Ontario & Western stock, as stock of a controlled affiliate, would fluctuate to some degree with the New Haven's own financial prospects. As events developed the disposition of the claims of these three banks was a source of interesting, if inconclusive, litigation but from the beginning it was evident that the problems they presented would not be easy of solution.

On the other hand, the remaining banks were secured in large part by pledge of First and Refunding Mortgage Bonds in face amounts substantially in excess of the amount of their respective notes, making their treatment a less complicated problem. This latter group of banks eventually was to band together and act in concert to obtain the most favorable treatment possible, while the other banks, because of their diverse collateral, were obliged to obtain separate representation and act separately.

The New Haven also was the guarantor of seven issues of bonds and stocks.* Its maximum liability under these guaranties was over $52,000,000. These guaranties presented problems of policy as well as finance since some guaranties might be continued for strategic or traffic reasons, while others might be disaffirmed as burdensome in relation to the benefits accruing to the estate therefrom.

The New Haven's 490,367 shares of preferred stock and 1,571,186 shares of common stock (20% of which was owned by the Pennsylvania Railroad Company) presented no particular problem except to discover any value warranting their participation in the reorganization. Stocks which had paid so few dividends in twenty-two years were not likely to be worth very much but the Pennsylvania Railroad was to contend earnestly that stockholder participation in the reorganized Company was warranted by the history of the property's earnings.

On the other hand, the leases held by the New Haven from its affiliated railroads, particularly the Old Colony lease, did present serious questions, probably the most serious questions of the proceeding. Whether the terms were too burdensome to justify continuation of the leases, whether the lines involved should be entirely severed from the system or whether modified terms should be proposed and their character—these were the considerations which entered into the disposition of problems arising out of the New Haven's six direct leases and two indirect leases.

Although it was not realized when the New Haven's petition was filed, another problem was to develop with respect to the terms upon which

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* These were: Boston Railroad Holding Company, 24,150 shares Preferred Stock; The New York Connecting Railroad Company, $24,000,000 First Mortgage 4½% Bonds Series A, $3,333,000 First Mortgage 5% Bonds Series B; New York, Westchester and Boston Railway Company, $19,200,000 First Mortgage 4½% Gold Bonds; Springfield Railway Companies, 29,338 Preferred Shares; New England Investment and Security Company, 370 Preferred Shares; New York and Stamford Railway Company, $178,000 Refunding Mortgage Gold Bonds.

the Company should use the facilities of the Boston Terminal Company, primarily the South Station in Boston, Massachusetts. At the time of its bankruptcy in 1935, the New Haven was required to pay 70% of the costs of operation and bond interest of the Terminal Company while 30% was paid by the New York Central as lessee of the Boston & Albany Railroad Company. However, practically all of the New Haven's liability arose from its lease of the Old Colony's properties and in turn from that company's lease of the Boston and Providence. With the disaffirmance of both these leases the liability, except any that might be held to be chargeable to New Haven for its own direct use of the Terminal, shifted to the lessors. Thus if the lessor's properties were to be kept in the system some solution would have to be found for the problem created by the charges for the use of the South Station which, the segregation studies were to reveal, contributed substantially to the deficits in operating these properties.

It was apparent from the outset that the solution of all the problems involved in the reorganization of this vast financial structure would be no easy matter. But even the most pessimistic parties did not contemplate that twelve years would elapse before a solution of the principal New Haven problems would be achieved.

The conflicting points of view as to the solution of these problems which the reorganization presented reflected themselves in the alignment of the parties to the proceeding. The point of view that the new capitalization should be liberal and the conviction that the New Haven had substantial potential earning power was represented by the Debtor and the chief common stockholder, the Pennsylvania Railroad, as well as the preferred and common stockholders' committees.* The point of view that the capitalization must be cut severely and that the burden of the leased lines must be diminished was represented principally by the Insurance Group, whose members were the holders of large amounts of virtually every class of secured New Haven debt, and the Mutual Savings Bank Group. Additional creditor support for this view was offered by the Independent Bondholders Committee which acted for a limited number of New Haven security holders. Interests holding issues of divisional bonds for the most part limited their activities to the particular claims and objectives of those holders. The point of view of the lessor lines was originally represented by the Mutual Savings Bank Group which, at the start of the proceeding, held substantial amounts of Old Colony securities, by the Old Colony and Boston and Providence Railroads themselves, and by a stockholders com-

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* The point of view of the New Haven stockholder, as represented by the Pennsylvania Railroad, was stated with enthusiasm and persuasiveness by one of the most distinguished law firms in Philadelphia. The preferred and common stockholders' protective committees, also ably represented, continued their advocacy of recognition of an equity in the New Haven property through the first District Court hearings on the approval of the Plan in the fall of 1943. The Pennsylvania Railroad continued its efforts through the Circuit Court of Appeals after the approval of the Plan in 1944. The picture that is occasionally painted of the reorganization of railroads under Section 77, in which helpless stockholder interests are eliminated without protest by creditor groups, thus could not be further from the fact in these proceedings.

mittee for Old Colony. Before the proceedings concluded, however, the number of parties taking up the cudgels for Old Colony increased substantially, including the City of Boston, the Massachusetts Department of Public Utilities, Old Colony commuter groups, townships on the Old Colony lines, railroad unions and others. These interests, of course, did not primarily adopt a system viewpoint in their contentions.

So the lines of conflict were eventually drawn. Before this stage was reached, however, the scene was set for the opening move required in the proceedings, the appointment of bankruptcy trustees.

CHAPTER III.

THE APPOINTMENT OF TRUSTEES.

Order No. 1 of the District Court, approving the New Haven's petition, directed the Company to give notice by newspaper publication that a hearing would be held November 6, 1935 at which the Court would consider the appointment of one or more trustees in bankruptcy of the petitioning Debtor's properties. The response to this action was marked and a large number of those interested in the properties gathered for the occasion at the federal court house in the Post Office Building in New Haven. At the very outset of the hearing the Court was confronted with a petition of the Governors of the six New England States requesting the Court to appoint trustees representative of the general public interest. Governor (now United States Senator) Theodore Francis Green of "the State of Rhode Island and Providence Plantation" himself presented the petition, which stated that those Governors had resolved to intervene in the proceedings to represent the paramount public interest involved in any plans affecting transportation in New England. This suggestion precipitated a statement by Judge Hincks that he seriously doubted his jurisdiction under Section 77 to entertain an intervention petition filed by one who represented only the public interest, in contrast to those having a financial stake. It was his view that this aspect of a Section 77 reorganization proceeding was committed to the Interstate Commerce Commission although, he stated, he of course would always have this important factor in mind.

After appearances had been noted for some sixteen creditors' representatives, the names of Howard S. Palmer, the New Haven's President, and James Lee Loomis, President of the Connecticut Mutual Life Insurance Company, were offered as trustees, the name of Mr. Palmer by William W. Meyer, general counsel for the Company, and the name of Mr. Loomis by Edward M. Day, Hartford counsel for various insurance companies. No opposition was voiced, although the Court itself raised the point whether Mr. Loomis was not too closely identified with creditor interests

by reason of his company's holdings of New Haven securities properly to act as an impartial New Haven Trustee. Thereafter in a memorandum of decision entered November 8, 1935, Judge Hincks, on his own initiative, added to the slate of trustees the name of Winthrop M. Daniels, Professor of Transportation at Yale University, and appointed Messrs. Palmer, Loomis and Daniels as Trustees by an order entered the same day.

Under paragraph (1) of Section 77(c) of the Bankruptcy Act, the appointment of bankruptcy trustees becomes effective only upon ratification by the Interstate Commerce Commission. A petition for this purpose was filed by the Trustees November 14, 1935, and the Commission by a divided vote granted the required ratification. Commissioner Meyer dissented from the majority's confirmation of Mr. Loomis's appointment on the grounds suggested by Judge Hincks, that Mr. Loomis should not be placed in a position of possible divided loyalty. However, Commissioners Porter and Mahaffie supported the Loomis designation without comment on this point.

One of the first tasks awaiting the Trustees was compliance with that paragraph of Order No. 1 which authorized the New Haven at any time prior to April 23, 1936, or such other date as the Court might fix, to disaffirm any of its existing contracts or leases. An intensive review of the contracts of the Company was immediately begun, and by June 2, 1936 the Trustees had terminated a sublease to its subsidiary, The Connecticut Company, a lease from the Connecticut Railway & Lighting Company,* a lease from the Chatham Railroad Company, and a contract with Miss Jean Annett.** Then on June 2, 1936 the Trustees rejected the New Haven's lease from the Old Colony Railroad Company. This was the culmination of a series of steps which a careful observer would have realized foredoomed the eventual result. On April 23, 1936, the Trustees had petitioned the Court for instructions with respect to the payment of rental due on March 3, 1936 under the Old Colony lease. The Trustees asserted that their studies showed that Old Colony had not earned any of the rental payments. The Court entered its order on April 28, 1936 advising the Trustees to withhold that rental payment until further order

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* The rejection of this lease became the subject of extensive and important litigation, discussed *infra*, p. 31.

** The history of this contract, while not pertinent to the reorganization proceedings, is of some interest because of the human element involved. Miss Jean Annett, while a passenger on the New Haven line, suffered severe injuries in 1913 which incapacitated her for life and for which the railroad admitted its liability. In lieu of making a large cash payment in settlement, and probably on the advice of their doctors that the claimant's anticipated span of life was very short indeed as a result of her injuries, the Company made an agreement on January 1, 1914 to pay her $10,000 in cash immediately and $700 per month as long as Miss Annett lived. Contrary to all predictions, Miss Annett is still alive, with the result that by the time the Trustees disaffirmed this very disadvantageous contract the Company had paid her $168,300, or considerably in excess of what was anticipated. Litigation over the rejection of her contract resulted in the determination that she was only an unsecured creditor entitled to participate pro rata in the common stock of the reorganized company allotted such creditors. (*Annett* v. *N. Y., N. H. & H. R. R.*, 92 F. (2d) 428, C. C. A. 2, 1937).

of the Court. It had been suspected that Old Colony was not earning its way and the Trustees' studies confirmed this beyond any question. These studies made rejection of this burdensome lease imperative and the Trustees took the required action by their petition of June 2, 1936.

With the rejection of this lease Old Colony of course became insolvent and therefore filed its petition for reorganization in the New Haven proceedings that very day. The Court's order approving the petition was likewise entered that day and fixed June 18, 1936 for a hearing on the appointment of a trustee for Old Colony. Forced into action by the New Haven's disaffirmance of this lease, the Old Colony interests, creditor, stockholder and public, organized in the interim to protect their financial or other stakes in the railroad. At the scheduled hearing, all creditors and stockholders of Old Colony represented thereat, except the Mutual Savings Bank Group, the holder of over seven million dollars of Old Colony Bonds, advocated the appointment of an independent trustee for Old Colony. These parties maintained that a conflict of interests was certain to arise if the same trustees administered the principal and secondary debtors' estates. Judge Hincks, however, believed the Court should have trustees whose duties and responsibilities were as broad as those of the Court, who must look at the problems of reorganizing the New Haven from the standpoint of a system operation. For this reason, he entered an order appointing the three New Haven Trustees as Old Colony's Trustees, and on November 18, 1936 the Interstate Commerce Commission ratified those appointments. Petitions for leave to appeal from the District Court's order of appointment to the Circuit Court of Appeals for the Second Circuit were filed by various Old Colony parties, but on December 30, 1936 the Circuit Court refused to allow the appeals without stating any grounds for its decision. Either that Court was in agreement with Judge Hincks, or took the view the order was not properly appealable under bankruptcy procedure.

Following disaffirmance of the Old Colony lease, the New Haven Trustees next filed with the District Court their report of disaffirmance of the lease of the Hartford & Connecticut Western Railroad Company's properties as of July 31, 1936. This action again required the lessor to file its petition for reorganization in the New Haven proceedings since it cut off, with one fatal stroke, the lessor's sole source of revenue. The order of the District Court entered July 31, 1936 provided for a hearing on August 14, 1936 on the appointment of trustees for this second subsidiary debtor which had asked to be reorganized with or as a part of the New Haven. The Reconstruction Finance Corporation, pledgee of stock of this leased line, appeared at this hearing and sought to introduce evidence upon which to base an objection to the appointment of Messrs. Palmer, Loomis and Daniels as this debtor's trustees. The hearing was, however, adjourned until December 4, 1936. At the adjourned hearing, the Reconstruction Finance Corporation argued that an independent trustee should be

appointed. However, Judge Hincks, for approximately the same reasons as given in the case of the Old Colony trusteeship, by decision of December 12, 1936, determined that the New Haven's Trustees should also act as trustees for the Hartford & Connecticut Western.

The appointment of these Trustees was ratified by the Interstate Commerce Commission on January 6, 1937, and on April 2, 1937 the Commission ratified the appointment of Henry B. Sawyer, designated by Judge Hincks as a trustee of the estates of the New Haven, Old Colony and Hartford & Connecticut Western to succeed Mr. Daniels who had resigned due to ill health. By this same order the Commission ratified the appointment of the New Haven's Trustees as trustees for the Providence, Warren & Bristol Railroad Company. The lease of this railroad's properties was disaffirmed by the Old Colony's Trustees on January 5, 1937, which action the District Court approved by order of January 14, 1937. No parties had appeared before the District Court in opposition to his appointment of these Trustees, perhaps being convinced by this time by the precedents in the other cases, that opposition to such appointment on the ground that the situation required an independent trustee would be futile.

These Trustees were to serve for twelve long years in their fiduciary capacity and discharge their functions in a faithful, diligent and commendable fashion. Despite the predictions of divided loyalty, voiced upon the occasion of the appointment of these individuals to their responsible positions, the occasions were rare indeed when even the contention was made that the Trustees had favored one debtor over another. Whenever any conflict of interest appeared to exist independent counsel were appointed. The effectiveness of this procedure is illustrated by the litigation over the application of the segregation formula to Old Colony shortly to be discussed.

CHAPTER IV.

THE SEGREGATION FORMULA.

Late in 1935, various mortgage trustees petitioned the court for an order for segregation of earnings of the properties under their mortgages. The New Haven Trustees therefore instructed their staff to prepare a formula for the segregation and allocation of earnings and expenses among the principal debtor's leased lines and mortgage divisions. The primary use of the formula was to ascertain the value of each part of the system to the whole as reflected in its earning power, knowledge fundamental to a fair distribution of reorganization securities under any plan of reorganization. With the District Court's approval of the rejection of the Old Colony lease and its direction to operate Old Colony for the account of the lessor, it was prerequisite to compliance with this direction that the Trustees segregate in their accounts the operations of Old Colony from those of the other properties of the New Haven. As other leases were dis-

affirmed, the same necessity arose and the formula also established the New Haven's claims against its lessors for the cost to the New Haven of the operation of their properties.

The Trustees also requested the preparation of severance studies, the purpose of which was to show the value of the various leased lines or mortgage divisions if they were divorced from the principal debtor and operated as separate units. Severance studies are to a degree speculative since they are based primarily upon the assumption of a separation of the system into competing parts. The segregation results, being founded primarily on ascertainable facts, are more reliable and carry considerable weight in the formulation of any reorganization plan.

Both classes of study are of a highly technical nature and to the task of preparing them was brought not only the knowledge and skill of the New Haven's own staff but also the invaluable experience of Mr. John E. Slater and Miles C. Kennedy of the New York Engineering firm of Messrs. Coverdale & Colpitts retained by the Insurance Group and Professor William J. Cunningham retained by The Mutual Savings Bank Group.

In general, the problem involved in preparing the segregation studies was to divide the New Haven's income account among seven leased line properties, eleven underlying mortgages and one system mortgage. The technique adopted in developing the New Haven's formula was as follows: Income not considered assignable to any of these was designated as "other income" of the system. All revenues were prorated on methods which as nearly as possible corresponded to the principles of divisions of rates and fares as between railroads. Where possible, expenses were assigned to the property where actually incurred. System expenses common to more than one property were apportioned on the basis of generally accepted methods. In the apportionment of freight revenue recognition is always given, and was given here, to terminal costs, as related to road haul costs, by the addition of constructive mileage blocks to the actual mileage of the terminal lines. The constructive mileage was based on the actual average road haul and terminal costs as developed in a road haul and terminal study, which in turn was based upon special studies of the various elements of yard, station and freight train work. A similar allowance was made for lines which were the points of interchange with other systems, at which points a constructive mileage allowance was made. Passenger, mail and express revenue was assigned on a mileage prorate basis. The apportionment of operating expenses, although later the subject of the most strenuous dispute, also followed generally accepted principles. Maintenance of way was largely assigned directly to the line where the expense was incurred, maintenance of equipment was assigned on a mileage prorate derived from the system cost for each type of equipment, transportation expenses assigned either directly or apportioned on a mileage prorate and so forth. A complete analysis of the bases upon which

the New Haven segregation formula was developed was filed with the District Court and later with the Interstate Commerce Commission in connection with the submission of the Debtor's first plan of reorganization on June 1, 1937.

The severance studies, also submitted to the Commission with the Debtor's first plan, were far more speculative in character. The primary assumption which had to be made in developing these studies was the unrealistic one that the lines concerned were to be separated from the system and would continue as separate operating units. In addition, the studies assumed that it would be possible for the severed property to obtain the equipment required for separate operation at no greater cost than was charged to it under the segregation formula; that it would be possible for the severed property to make arrangements for the repair of its equipment at a cost not exceeding that charged in the segregation study; that the severed property would have access to all common terminal areas in its territory; that the expense of a separate organization would be no greater than the overhead charges assigned to that property under the formula in the segregation study; and, that the purchasing power, necessary to all phases of railroad operation, of the severed property would be equal to that of the existing system. The dubious value of studies based upon such assumptions was recognized by both the Court and the Commission in their subsequent decisions with respect to the reorganization plan.

The formula was filed with the District Court and Bankers Trust Company, relying on the results of the formula to sustain its position, on October 7, 1937 filed a petition requesting the discontinuance of payments under the Boston and Providence lease. Criticism of the use of the formula for this purpose was voiced and, therefore, the District Court by order entered October 29, 1937, referred to the Interstate Commerce Commission a certified copy of the results of the Trustees' segregation of earnings, with the request that the Commission transmit to the Court its recommendations with respect to the formula adopted in these studies. Since by that time the Commission had before it the entire record of exhibits and testimony with respect to this formula, submitted in connection with the hearings on the Debtor's first plan of reorganization begun in July, 1937, no further evidence was received by the Commission in connection with this order of reference. Examiner Wilkinson in January, 1938, issued his report recommending that Division 4 of the Commission approve the Trustees' segregation formula, and by order entered April 9, 1938 following the filing of briefs by various parties and oral argument, the Commission, by Division 4, adopted the Examiner's report.

Immediately following approval of the formula by the Commission, the validity of the application of this formula was challenged in the courts. Under date of April 19, 1938, New Haven's Trustees filed a report of their administration of the Old Colony properties from October 23, 1935, when

the New Haven's reorganization proceedings were instituted, up to December 31, 1937. The Trustees requested that the Court approve their account and order that the amounts stated therein be an administration charge against the earnings and properties of Old Colony prior to any mortgage or other lien thereon. Upon due notice a hearing was held before the District Court on the account which showed a balance in favor of the New Haven estate as a result of such operation amounting to $5,775,650 with respect to Old Colony operation, $5,461,451 with respect to operation of Boston and Providence for Old Colony's account as lessee and $551,936 resulting from operation of Providence, Warren & Bristol under the same circumstances. The total difference between revenues and expenditures in this operation of leased properties was the rather staggering sum of $11,789,137 (including $2,048,928 paid by the New Haven under its lease obligations), and this for only a two-year period.

Since the New Haven was making a claim against Old Colony, for the first time a possible conflict of interest on the part of the Trustees arose. For this reason special counsel were appointed for the Old Colony by the Court and such counsel filed detailed objections to the Trustees' accounts. It was first objected that Old Colony could not be charged with the capital expenditures and operating deficits made or incurred prior to the time the lease was rejected. The District Court overruled this objection, holding on July 2, 1938 that under his Order No. 17, pursuant to which New Haven's Trustees were directed to operate Old Colony, all operation was to be for the account of the lessor railroad and that thereafter Old Colony accepted such operation with notice of the existence of Order No. 17.

Undoubtedly this result of charging Old Colony with the costs of operation prior to rejection of the lease is sound. Section 77 requires operation of a lessor's properties for the lessor's account by a lessee who eventually disaffirms a lease and the lessee's creditors should not be asked to bear the expense of the operation. Of course, Old Colony could not do otherwise than accept operation by New Haven's Trustees since it had no operating company to which the properties could be turned over. A long line of cases arising out of equity receiverships supported the Court's decision that upon rejection of a lease where a lessor is unable or unwilling to assume operation of its property the lessor is chargeable with all payments, expenditures and operating deficits arising out of such operation.

It was also objected by special counsel for Old Colony that the Old Colony should be permitted to set off its breach of lease claim against the New Haven administration claim. The Court refused to sustain this objection on the ground that the administration claim was not a contractual claim and hence not subject to set off for contractual claims. The Court then approved a charge against the Old Colony estate of $5,775,650 for its own deficit operation and $5,461,451 for the deficit operation of the Boston and Providence. The incidence of the expense incurred in the administration of the Providence, Warren and Bristol was reserved for later determination.

An appeal from this adjudication was taken to the Circuit Court of Appeals and, after argument, that Court handed down its decision on May 8, 1939.* The Court ruled that the New Haven Trustees were not entitled to a prior lien for rent paid prior to the disaffirmance of the lease, although they were entitled to an unsecured claim therefor. The Old Colony creditors were charged, it said, with notice that those payments were made by trustees in bankruptcy and therefore they were subject to the doctrine that rejection of a lease relates back to the time of the commencement of the bankruptcy with the concomitant right of recovery of payments made prior to such rejection. A lessor would be permitted to retain such payments only where it would be completely inequitable to require repayment, which was not Old Colony's case. Further, the Circuit Court ruled that the operating deficits arising after rejection of the lease created a prior lien in favor of New Haven. Lastly, the Circuit Court held that it was proper for the District Court to refer the segregation formula, upon which the Trustee's report of administration was based, to the Interstate Commerce Commission for recommendation and approval, even though literally construed the statute does not cover a case where the Court has continued operation by a lessee after a lease has been terminated.** The appellate court felt that the District Court needed the Commission's guidance on this subject. Furthermore, it stated, the District Court itself could not legally evolve a segregation formula itself since under the Interstate Commerce Act the Commission alone has power to divide rates, which division would be necessary in the development of a segregation formula.***

These important rulings became the law of the case, for a petition for certiorari was denied by the Supreme Court of the United States on October 16, 1939. The significance of the decision in this litigation should not be missed. It settled as to the New Haven proceedings the validity of the segregation formula and the consequences of its application to leased line properties. But the influence of the holdings was not limited to the New Haven case. They became the law governing the procedure in developing segregation formulæ with regard to leased lines and established for the first time in a Section 77 proceeding the priority of a claim for expenditures made in operating a leased property for the lessor's account. These were the first, but by no means the last, important principles of reorganization law established in the New Haven case.

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* *Palmer* v. *Palmer*, 104 F. (2d) 161 (1939); cert. den. 308 U. S. 590.

** The formula had been referred to the Commission under Section 77(c) 10 which permitted such a reference for ordinary purposes but did not, according to the Circuit Court, literally cover a case where the Court had continued joint operation of a leased line under the obligation imposed by the Act after the lease had ended.

*** Interstate Commerce Act, Section 16(6).

CHAPTER V.

THE DEBTOR'S FIRST PLAN OF REORGANIZATION.

As already noted, the New Haven did not file its first plan of reorganization until June 1, 1937 at which time it made its initial attempt to deal comprehensively with problems confronting the Company, its creditors and stockholders. Under the mandatory provisions of the statute the principal Debtor was required to file its proposed plan within six months from the date of filing of its petition, and in accordance with the law's requirements, Judge Hincks, on November 12, 1935, entered an order directing the New Haven to file such a plan by April 23, 1936. On the day following entry of this order the New Haven's Board of Directors appointed a committee of its members to embark on the development of this plan. The committee, designated the Plan Committee, consisted of Messrs. Edward Milligan, James L. Richards, Edward G. Buckland, H. I. Pratt, John L. Hall and Howard S. Palmer. This committee selected the firm of Choate, Hall & Stewart of Boston, Massachusetts, to act as its counsel, a firm which had been identified with the New Haven from its earliest days when Charles F. Choate, Esq., was its legal representative.

By orders entered April 17, 1936, October 10, 1936 and January 22, 1937, the time of the Debtor to file a plan was extended, pursuant to the provisions of Section 77, to June 1, 1937. Extensions were required principally because it was impossible for the New Haven staff to complete its segregation, severance and other studies within the time allotted. Opposition to the last extension was voiced by the Reconstruction Finance Corporation at the hearing held in connection with the entry of the extension order of January 22, 1937, but that objection the Court overruled.

With the filing of the plan of the Debtor on June 1, 1937, the petitions filed with Judge Hincks for permission to intervene in the proceedings increased. Prior thereto, eleven such petitions had been granted by the District Court and within a short time thereafter, ten or more additional interventions were permitted. The interests represented by these intervenors ranged from stockholders' committees and individual creditors to the Insurance Group.* At one time as many as thirty-five parties were actively participating in the case before the Interstate Commerce Commission and the District Court. With such a formidable array of parties in interest and their counsel, the prospects for a lengthy and much litigated proceeding were greatly enhanced.

The Interstate Commerce Commission fixed July 20, 1937 as the date when hearings on the New Haven's plan would commence, thus giving all

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* Appendix A hereto lists the principal intervenors and their counsel.

parties a reasonable opportunity to study the terms of this plan. The Debtor's Plan Committee proposed a new capitalization of $333,235,200, plus 1,182,151 shares of no par common stock, in contrast to the Debtor's existing capitalization of over $475,000,000 in funded debt and capital stock. The plan proposed to reduce total fixed charges, rents and guaranties from $20,329,920 to $9,942,909. Instead of a complicated capital structure consisting of some thirty-seven different debt issues as well as preferred and common stock, the Plan Committee proposed that a few underlying issues be assumed, that new fixed and contingent interest system mortgages be created, and that two classes of preferred and one class of common stock be issued. The proposed issuance of a first preferred stock and a second preferred stock was stated by the Committee to be the product of its belief that secured creditors, whose coverage and segregation earnings did not entitle them to an equal amount of first mortgage bonds, should have their claims filled out in income bonds but such treatment would require too large an issue of income bonds to maintain a proper ratio of debt to stock. Thus, the Debtor intended that these creditors' unsatisfied balances be filled out in equal amounts of income bonds and first preferred stock, the preferences of the latter being sufficient compensation to justify allotting them an equity rather than a debt security of the new company. The plan provided that the second preferred stock should go to the unsecured creditors. In addition, it permitted the old preferred and common stockholders to participate in the distribution of new common stock at the rate of five shares of old preferred for four shares of new common, and five shares of old common for one share of new common. Following the practice of many equity receiverships where the old stockholders were customarily permitted to participate, but only upon the making of further cash payments, the Debtor's Plan Committee claimed there was an equity in the properties justifying a distribution of reorganization securities to the New Haven's stockholders. Not only that, but the Plan Committee even found that the common stocks of the three subsidiary Debtors should participate, Old Colony stockholders at the rate of *two* New Haven shares for *one* Old Colony,* Providence, Warren & Bristol stock to be exchanged share for share, and Hartford & Connecticut Western to be exchanged at the rate of one share of New Haven stock for three of the secondary debtor. The Plan Committee had obviously adopted the standard concept of reorganization prevalent in equity receiverships that everyone should be alloted some interest in the new company. Perhaps it was because the investing public had become accustomed to this traditional approach to reorganization problems, that the drastic reorganization plans, in several cases wiping out debt as well as equity interests, which were eventu-

* It is not only with the benefit of hindsight that this appears to be remarkably generous treatment, in the light of the eventual elimination of not only Old Colony's stockholders but its unsecured creditors as well, for the segregation studies had already proclaimed the parasitical tendencies of the Old Colony.

ally approved by the Interstate Commerce Commission, evoked such widespread charges of confiscation of property. But those developments lay in the future when the Debtor's first plan was conceived.

Another feature of the Debtor's plan was the extent to which existing obligations were to be left undisturbed. It proposed that seven underlying issues totalling over $36,000,000 be assumed by the reorganized company. Eventually three of the smaller underlying issues were paid off and the Commission cut over one-third from this total by allotting to the Central New England Railway Company's $12,000,097 of First Mortgage Bonds only an equal amount of new fixed interest bonds.* In addition, the Debtor's plan proposed the assumption of the old company's guaranty of two underlying bond issues, those of The New York Connecting Railroad Company and New York and Stamford Railway Company, and the guaranty of the preferred stock of the Boston Railroad Holding Company.** Assumption of this guaranty was deemed essential to preserve the New Haven's investment of over $30,000,000 in the Holding Company, since the default on the guaranty might result in wiping out this very substantial investment. The New Haven Plan Committee and its counsel, Mr. John L. Hall, wisely recognized this fundamental fact and the Insurance Group and other creditors joined with the Plan Committee in its attempt to preserve the New Haven's financial stake in the Holding Company. The Boston & Maine Railroad at that time was undergoing an important rearrangement of its debt structure which these parties believed would enhance to a large degree the value of Boston & Maine common stock with the consequent benefit redounding directly to the Holding Company and indirectly to the New Haven. Contrary to the position taken by its principal bondholders, the Insurance Group, Bankers Trust Company, as Trustee of the Debtor's First and Refunding Mortgage took the position that this guaranty should not be assumed. Examiner Wilkinson in his Proposed Report of November 17, 1939, was to disagree with Bankers Trust Company and recommend the assumption of this guaranty.***

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* The market value of these bonds following the filing of the Debtor's plan had remained constant in a range around 70. By the time the Commission's first plan came out in 1940 proposing less favorable treatment these bonds had fallen over 20 points and were quoted in a range under 50.

** This was a holding company formed in Massachusetts in 1909 into which the New Haven's holdings of Boston & Maine Railroad Company stock were put. *Cf., Brandeis: A Free Man's Life*, by Alpheus Thomas Mason, Chapter Twelve, The New Haven Railway: Building an Empire (pp. 1905-1909); 220 I. C. C., pages 545, *et seq.*

*** The Examiner's Report stated:

> "The Bankers Trust Company objects to the assumption of the Boston Railroad Holding Company guaranty on account of the unfavorable earnings of the Boston & Maine Railroad whose stock is held by the Holding Company. On the basis of present earnings the principal debtor will be called upon to advance $96,600 to meet its obligation under this guaranty. Failure to assume the guaranty might result in the sale of all the assets of the Holding Company for the benefit of its preferred stock outstanding in the hands of the public, and in that event, at present market values, the principal debtor's investment in the

Despite this, Bankers Trust Company continued to oppose this recommendation and the Commission in its Report of March 22, 1940, was to overrule the Examiner, the Plan Committee and the Insurance Group and require disaffirmance of this guaranty.*

Subsequently, certain recent purchasers of Holding Company Stock at low prices, requested the Massachusetts Legislature to dissolve the Holding Company with a resulting elimination of the New Haven's interest in the Boston Railroad Holding Company.**

The New Haven's first plan also provided that the system should survive with all its existing component parts retained. This was to be accomplished through a consolidation with the principal Debtor of the three secondary Debtors, Old Colony, Hartford & Connecticut Western,

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Holding Company would be entirely wiped out. The principal debtor's book investment in the assets of the Holding Company is stated on its balance sheet at $31,779,850. In the pro forma balance sheet hereinbefore referred to this investment was restated at $4,175,859. While this latter appraisal cannot be supported by present market prices alone, the appraisal for purposes of this proceeding would not seem unduly optimistic, and considering the prospects for an improvement in the earnings of the Boston and Maine, the Commission should find that the assumption of this guaranty is justified."

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* The Commission's Report stated, 239 ICC 417:

"* * * In our opinion, the prospects of the Holding Company receiving any return in the reasonably foreseeable future on the securities comprising its assets are such that the principal debtor will be compelled to continue indefinitely the advancement of funds under this guaranty. Under these circumstances, we conclude that the plan approved herein should provide for its disaffirmance."

The earnings record of the Boston & Maine since the readjustment plan was put into effect in 1940 in some respects contradicts the opinion expressed by the Commission.

** Intermittent attempts to divest the New Haven of its interest in the Boston Railroad Holding Company were made through the years. In the reorganization proceedings an application by holders of Boston Railroad Holding Company Preferred Stock was made in April, 1943, seeking the liquidation of the Boston Railroad Holding Company which would have resulted in benefit to these stockholders alone and the destruction of the New Haven's investment. The matter of the liquidation of this Company under this application was held in abeyance for a number of years pending the determination in the Plan of the proper disposition of the New Haven's guaranty of the Boston Railroad Holding Company's Preferred Stock. To counteract this move and to protect the New Haven's investment the Trustees applied for leave to purchase the outstanding stock of the Boston Railroad Holding Company. The Court denied the application and held that this was properly a matter for determination by the Commission.

Thereafter, the dissolution of the Boston Railroad Holding Company was again stirred up, this time in the 1945 Spring session of the Massachusetts Legislature. A bill was introduced in the Massachusetts General Court for the dissolution of the Boston Railroad Holding Company, which would have resulted in wiping out practically the entire investment of the New Haven in the Company. This bill was defeated, the final vote having been taken in the Massachusetts Senate on June 7, 1945.

Another bill requiring the dissolution of the Boston Railroad Holding Company, similar to that introduced in the 1945 Session of the General Court of Massachusetts, was again introduced in the 1946 Session. Pressure for the passage of the bill was sufficiently great in this year, however, to bring about its enactment and the bill was signed by Governor Maurice J. Tobin on June 12, 1946. An amendment introduced in the Massachusetts Senate proposed an orderly liquidation of the New Haven interest in the Holding Company but on July 3, 1947, a majority of the public stockholders petitioned the Massachusetts Supreme Court to appoint a statutory receiver to sell the Boston & Maine stock. The matter is now pending before this Court.

and Providence, Warren & Bristol, and the assumption of the lease from the Boston and Providence. The proposed retention of Old Colony in the system was destined to be the subject of the most violent disagreement among the parties and of conflicting views even within the Commission itself.

Such was the Debtor's conception of its reorganization, and the Commission fixed July 20, 1937 for the commencement of hearings on its proposals. These hearings were to continue intermittently until November 16, 1937, when the record was closed for the first time. During this period many parties of identical and opposing views participated and contributed substantially to the compiling of a comprehensive record of the New Haven. An accurate count showed that during the course of these hearings and the hearings that followed sixty-seven individuals filed their appearance, one or more of whom represented separate intervening interests. The delays which the presence of so many parties necessarily occasioned, although regrettable, were unavoidable if the rights of all were to be protected.

The July hearings opened before Commissioner Charles D. Mahaffie and Examiner Harvey H. Wilkinson of the Commission's staff in a crowded room in the Interstate Commerce Commission Building, Washington, D. C. Mr. John L. Hall presented the case for the Debtor and marshalled the Plan Committee's evidence in support of its proposals. Mr. Hall offered as his first witness the Chairman of the Plan Committee, Edward G. Buckland, who was Chairman of the New Haven's Board of Directors and had been connected with the New Haven since before the turn of the century. Mr. Buckland's direct testimony was devoted to a review and analysis of his Committee's plan. Cross-examination of this witness was reserved for later hearings by most parties, although Arthur Garfield Hays, representing the Independent Bondholders Committee, did question Mr. Buckland at some length. The Debtor's witness to support its forecast of railway operating revenues for a prospective year, a fundamental consideration in formulating a plan, was the late Mr. Frank J. Wall, Vice President in Charge of Traffic. A study of this character is highly technical and involves consideration of all phases of traffic over the road, passenger and freight, an analysis of historical trends and an informed prediction as to the future. Wall's estimate of passenger revenues in the hypothetical year was $29,000,000. His judgment of prospective freight revenues was a gross of $50,296,000 and of all other revenues, $9,500,000. With these total operating revenues of $88,796,000 the Plan Committee believed the Company could support fixed charges of almost $10,000,000 annually.

It would be unfair to cite in contradiction of Mr. Wall's prognostications the actual operating revenues of the New Haven ten years after his testimony was given because of the impact of the war and its aftermath on railroad earnings in general. But it is of interest to note that in 1946

the New Haven operated at a loss despite the fact that its aggregate operating revenues were $149,259,513 or one and two-thirds times as large as Mr. Wall's estimate. Freight revenue was $76,811,081, passenger revenue $60,192,021 and all other revenue $12,256,411 in contrast to Mr. Wall's predictions. However, in the year of Mr. Wall's predictions the New Haven's operating ratio was 78.51 while in 1946 it was 85.91, illustrating the extent to which an informed judgment as to prospective earnings must also be coupled with a similar judgment as to expense of operation. These figures show the speculative nature of such predictions in an industry in which unforeseeable fluctuations in economic conditions of the country and world affairs play an important part.

The next witness for the Debtor was Mr. Harry W. Dorigan, Executive Assistant to the Bankruptcy Trustees. It was his task to present and defend the all-important evidence of the Plan Committee of a forecast of system earnings and the segregation and severance studies upon which the Plan's basic terms were founded. The nature of these studies has already been discussed, but their revelations with respect to Old Colony warrant specific consideration. The segregation study showed that Old Colony had been operated for the twelve-month period ending May 31, 1937 at a deficit of over $2,000,000,* while the severance study with all the favorable assumptions that such a study involves, indicated that operation of the Old Colony, Boston and Providence, and Providence, Warren & Bristol as a separate unit would reduce this deficit by only slightly in excess of $110,000 per year, although such severance would reduce the system's income available for fixed charges by over $1,000,000 annually. On the other hand, the system would be relieved of the deficit operation of these lines so that in the overall picture the system would be better off after severance. For the most part, the segregation and severance studies plainly indicated that the Providence, Warren & Bristol, Hartford & Connecticut Western, and Old Colony were drains on the system's revenues. Similarly, the application of the formula to the Boston and Providence produced a deficit in operations over that company's lines, but a discounting of this result was permissible because of the strategic location of that railroad as the most direct and suitable route from Boston to Providence.

The Debtor's last witness was Mr. George T. Carmichael, then the New Haven's Comptroller. The Debtor had submitted, as an exhibit, a *pro forma* balance sheet to indicate the New Haven's position after reorganization. Mr. Carmichael discussed the various accounts of which this balance sheet was composed. In addition, Mr. Carmichael discussed the segregated physical values of the various branches of the Debtor's system,

* Old Colony's deficit resulted from the disastrously unprofitable passenger service it rendered, the greatest source of the losses being the commuter lines which operate from Boston to Middleboro and Plymouth, Massachusetts, which, together with a few short branches, are known as the "Boston Group". Within the Boston Group, the segment from Boston to South Braintree (later studies were to show) accounted for at least one-half of the total Old Colony deficit.

the Debtor's schedule of investments, the balance sheets for the Old Colony, Providence, Warren & Bristol, and Hartford & Connecticut Western, and statements showing proposed economies in the operation of the three Debtors through abandonment of lines and other measures.

This testimony concluded the Debtor's case and Commissioner Mahaffie inquired whether any intervenor intended to present a plan at that hearing. Various parties stated that they intended to present plans but were not yet prepared to do so, and the hearing was then adjourned until September 9, 1937.

When the Commission hearings reconvened in September the principal plan amendments on file were those of the Insurance Group and the Independent Bondholders Committee. Other parties in interest for the most part filed general objections, primarily with respect to the treatment accorded them, rather than concrete overall reorganization proposals. The Insurance Group on September 7, 1937 filed its objections to the Debtor's plan and made its first affirmative proposals. The Group's activities in the proceeding at this point centered chiefly around an analysis of the Old Colony and Boston and Providence problems in an effort to solve these problems, which were so intimately bound up with the duty of the railroad to render public services without jeopardizing the system as a whole. The fundamental proposals of the Insurance Group were that the Old Colony and Providence, Warren & Bristol railroad companies be severed from the New Haven system and that the Boston and Providence lease be modified. It further recommended that the Debtor's proposed First Preferred Stock be eliminated, that the treatment of various creditors be revised and changes made in the terms of the new securities allotted creditors, and that a reorganization committee, consisting of five members, be designated to carry out any approved plan rather than effectuation of the plan through the Company's Board of Directors as proposed by the New Haven.

The Independent Bondholders Committee agreed with the principal Debtor that the secondary Debtors should be retained in the system through merger. It disagreed with the Debtor's proposed participation by the old preferred and common stocks of the principal and secondary Debtors, asserting that these security holders should be allowed to participate only to the extent of ten-year warrants to purchase new common stock. The Committee's plan also opposed the issuance of any preferred stock and suggested different characteristics and bases for the allocation of new securities. Lastly, this plan proposed a Board of Directors of fifteen members, seven to be elected by the first and refunding bondholders, six by the income bondholders, and two by the common stockholders. By a process of debt retirement, eventual control of the Board could devolve upon the common stockholders.

At the reopened hearing, the Debtor's witnesses were subjected to vigorous cross-examination by counsel for many parties—the Independ-

ent Bondholders Committee, Mutual Savings Bank Group, Insurance Group, State of Rhode Island, New England Railroad Mortgage Trustee, New England Governors and various bank creditors—all aiming to improve their positions under the Debtor's plan. The only party to produce evidence at this hearing to support its proposals was the Insurance Group. The Group presented as witnesses to discuss its recommendations from the financial aspect Mr. James H. Brewster, Jr., Chairman of the Group and Vice President and Treasurer of the Aetna Life Insurance Company, and Mr. Harry C. Hagerty, Vice Chairman of the Group and Vice President and Treasurer of Metropolitan Life Insurance Company.

The Group had retained the engineering firm of Coverdale & Colpitts to aid it on technical matters, and Messrs. Slater and Kennedy of that firm, who had analyzed all phases of the New Haven's operations as a system and also the Debtor's various studies, testified on the Group's behalf. These experts testified at length and in great detail in support of the Group's fundamental position that the deficit producing leased lines, with the exception of Boston and Providence, should be cast adrift.

When no other party offered evidence, the Independent Bondholders Committee sought to introduce its plan into evidence through its Chairman. However, Commissioner Mahaffie's interrogation of the witness as to the bonds represented by the Committee developed that it did not have the representation required by Section 77 and the plan was not received in evidence, but merely marked for identification. The Commissioner then fixed a final date for filing a plan or a modification of the Debtor's plan and ruled that the final hearings on all plans would be held on and after November 9, 1937.

Sixteen parties filed objections, petitions or proposals before the deadline fixed by the Commission.* These parties for the most part outlined with their plans and proposals the evidence they intended to introduce in support of their positions and served on the interested parties copies of the reports of their experts, which reached, in some instances, diametrically opposed conclusions. Just prior to the hearing, on November 5, 1937 the Insurance Group filed its comprehensive reorganization plan. In addition to the proposals already made with respect to Old Colony, Boston and Providence, and the terms of the Debtor's proposed securities, this Group recommended, for the first time, an overall capitalization for the New Haven of $365,000,000 to consist of assumed obligations, a special series

* These were: Supplemental petition of Insurance Group, Mutual Savings Bank Group modifications of Debtor's plan, plan of Old Colony Railroad Company, plan of Protective Committee of Old Colony Stockholders, modifications of Debtor's plan of secured banks, petition of New England Railroad Company First Mortgage Trustee, modifications of Debtor's plan of Bank of Manhattan Co., petition of State of Rhode Island and Rhode Island Commerce Commission, statement of New England Governors, objections of Rhode Island Hospital National Bank, proposals of Aldrich Trustees and United Gas Improvement Co., objections of Springfield Railways Companies, proposal of Merchants National Bank of Boston, statement of Pennsylvania Railroad Co., and marshalling plan of Reconstruction Finance Corporation.

of First and Refunding Mortgage Bonds limited in amount,* a Series A issue of First and Refunding Mortgage Bonds and preferred and common stocks. No participation by the old common or preferred stocks within this capitalization was contemplated.** The Group also recommended that the reorganized company continue its existing leases from the Providence & Worcester Railroad Company, the Norwich & Worcester Railroad Company, and the Holyoke & Westfield Railroad Company.

The hearing opened with the cross-examination of two of the witnesses who had testified for the Insurance Group at the preceding hearing, Messrs. Brewster and Hagerty, but there was no examination of the Group's engineering experts. The Old Colony Railroad Company then presented its case through the Chairman of its Plan Committee, Mr. Philip Stockton, President of the First National Bank of Boston, and its expert, Mr. William J. Backes. This plan stated that consideration had been given to independent operation of Old Colony's lines but conceded that Old Colony should be retained in the system. In contrast to the Debtor's proposal that Old Colony be acquired by issuance of over $14,000,000 of reorganization debt securities and 250,000 shares of common stock, the Old Colony Railroad itself proposed that the New Haven issue to it for its properties over $14,000,000 in debt obligations and for its breach of lease claim over $12,500,000 in second preferred stock, as well as asking for the release of all New Haven claims for operation of Old Colony for its own account, then something over $5,000,000. In addition this company likewise thought it fair that it receive the treatment accorded holders of the New Haven's First and Refunding Bonds to the extent of such bonds owned by it.*** When contrasted with the eventual allotment by the Commission to Old Colony of some $7,697,033 of reorganization securities, the proposals of this Plan Committee seem extravagant indeed although, of course, at that time the Trustees' administration reports showing the total deficits accumulating as a New Haven claim against Old Colony had not been filed.

The Old Colony Committee's plan was founded upon studies of its expert, Mr. Backes, and the Old Colony Shareholders Committee's expert, Mr. Joseph L. White. Mr. Backes attacked both the segregation and

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* Allotted to certain fully secured creditors.

** The position taken by the Insurance Group in this case may be contrasted with the position certain insurance companies took in the *Erie* and *Chicago-Great Western* reorganizations. In the former the Insurance Group agreed in a compromise with the Debtor on a plan which permitted participation by the old Preferred and Common Stocks by the issuance to the holders of such Stocks one new share of new Common Stock for the five old shares and warrants. In the latter the Hagerty Committee, on whose membership were the representatives of two of the country's largest insurance companies, one such representative being Committee Chairman, proposed a plan which permitted participation by the old Preferred Stock.

*** Old Colony had received $3,600,000 of New Haven's First and Refunding Bonds under an agreement executed in connection with the sale to New Haven of all the capital stock of the Old Colony Steamboat Company in 1905. That agreement provided that at the termination of the New Haven's lease of Old Colony's railroad properties, on demand of Old Colony the New Haven would either pay off the Bonds or redeliver the steamboats. Old Colony's bankruptcy trustees wisely demanded payment of the Bonds since the steamboats were either non-existent or of little use to Old Colony.

severance studies of the New Haven and, on the basis of proposed economies and changes in certain principles of the segregation studies and on the basis of Old Colony's severance value, he contended that Old Colony should be treated for plan purposes as if it actually had earnings available for rent and interest of almost $400,000 annually rather than the deficit shown by the New Haven studies. However, Mr. Backes' testimony was seriously undermined by cross-examination.

One interesting feature of this White report, which Mr. Backes supported, concerned an unusual idea for the separate operation of Old Colony. It was the opinion of Mr. White, concurred in by Mr. Backes, that Old Colony could separately operate as an independent carrier by establishing a car-ferry system between Newport, Rhode Island, and New York City as a result of which Old Colony would be connected with the country's main trunk line railroads. It would then become the principal route for freight traffic to northern New England. This suggestion was said to be based upon a study of successful car-ferry operations on the Great Lakes between the United States and Canada and on the Atlantic Ocean between Florida and Cuba. But the study overlooked the obvious fact that there existed no competitive rail or trucking facilities for the movement of traffic over the same routes in those cases, which probably alone accounted for the profit in the ferry operations. This car-ferry, White admitted, would cost the Old Colony some $6,000,000 to establish, a sum which certainly could not then be found in Old Colony's exchequer. As a matter of fact, the very great doubt surrounding the practicability or prospects of success of this ferry scheme would, he further admitted, lead him to recommend the sale of Old Colony to New Haven if suitable terms could be arranged.

The Old Colony Shareholders Committee, which employed Mr. White, suggested that its bondholders receive over $14,000,000 in new New Haven bonds and that its stockholders receive over $31,000,000 in first and second preferred stocks. In return, all Old Colony assets, including its breach of lease claim against New Haven, would be surrendered to New Haven. Its evidence in support of this very generous treatment was primarily the reports of Messrs. White and Backes, and the highly speculative severance studies. As later events proved, this evidence was not taken very seriously by the Commission.

On the same day, November 11, 1937, the Boston and Providence interests also availed themselves of the opportunity afforded by this hearing to attack the segregation formula, which had revealed the highly unfavorable aspects of the Boston and Providence lease. That railroad's expert, Mr. H. N. Rodenbaugh, contradicted the principles underlying the formula in certain respects and the formula's results, and intimated that the railroad could align itself with another carrier on terms equally advantageous with those it enjoyed with the New Haven. Cross-examination of Mr. Rodenbaugh was deferred to give all parties an opportunity to study his state-

ment. At a later time, it was brought out by counsel for the Insurance Group that Mr. Rodenbaugh's theory with respect to the segregation formula was really to spread local passenger losses and the cost of local passenger service, particularly terminal expenses, over the entire system, in line with what had been suggested by Old Colony's witnesses. Since none of these experts would agree that terminal passenger costs at New York and other important centers should be spread over the whole system, their testimony was seriously weakened.

Next, the Mutual Savings Bank Group, through its Chairman, Mr. Myron F. Converse, President of the Worcester Five Cents Savings Bank in Massachusetts, offered its proposals. In his statement, Mr. Converse agreed with the Debtor's scheme to retain the Old Colony within the system. However, the Group disagreed with the Debtor on its use of physical value rather than earnings as a primary basis for capitalizing a reorganized New Haven. On its own theory of valuing the New Haven's assets, it recommended a reduced capitalization of but $350,000,000 which was not intended to permit participation by the old preferred and common stockholders. This Group agreed with the Debtor that the Company could assume fixed interest charges approximating $9,000,000 annually, but dissented on the treatment of various creditor interests. With respect to the participation of Old Colony, Mr. Converse and his associates approved the Debtor's proposal except that for compromise purposes, it suggested an exchange of Old Colony stock for New Haven stock on a share for share basis only. Lastly, it recommended that a new board of directors of fifteen members be elected, one-third by the holders of new income bonds and one-third each by the holders of the new preferred and common stocks. The Savings Bank Group's expert witness in support of these proposals was the Professor of Transportation at Harvard University, Mr. William J. Cunningham.

As the hearing drew to a close other parties including the fully secured bank group and the under-secured banks, the Reconstruction Finance Corporation, Railroad Credit Corporation and the Pennsylvania Railroad sought to bolster their positions. The Governor of Rhode Island testified for the public interest; the Rhode Island Commerce Commission presented that State's position; the Debtor offered testimony in rebuttal, and the hearing finally adjourned on Tuesday, November 16, 1937. At its conclusion, Commissioner Mahaffie authorized the filing of briefs by any party before January 15, 1938.

These hearings typified the character and progress of a reorganization proceeding for a large and important railroad property. They were lengthy, extending over a five-month period, but they were necessarily so, for the subject required exhaustive and cautious treatment with the rights of so many investors involved. There is little doubt that five months of study devoted by the management of a railroad to the question of acquiring a new part of the system by private negotiations wholly within the control of the parties in interest would be considered necessary deliberation. The contrasting process of synthesizing the

components of this system, which task had to be accomplished through administrative and judicial proceedings and through litigation does not, therefore, seem unduly long. It must be remembered that at this stage of these proceedings, and, indeed, throughout all of the work that was done with regard to the plan until the Spring of 1943, the parties were required to act without an authoritative interpretation of the meaning of the act on which they relied. These proceedings were complicated, but with so many parties participating no other result was possible. Over forty witnesses had appeared and testified, innumerable exhibits of a technical nature were introduced and a record of two thousand two hundred and twenty-three pages compiled. Reflection upon these factors should inspire a reconsideration by the many critics of the reorganization process whose ever present charge of needless delay and waste must be attributed only to unfamiliarity with the actual workings of a Section 77 proceeding. Perhaps the fault lies in the statute but the blame should not be rested on the doorstep of the Commission, the courts, the parties, or their counsel, all of whom, while diligently protecting the interests they represented, in the best of faith, strove mightily to bring about the termination of the proceeding.

While briefs were being prepared, the secondary Debtor, Hartford & Connecticut Western Railroad, on December 31, 1937, filed its proposed plan of reorganization. Since the New Haven held all but some three thousand shares of this railroad's capital stock and New Haven representatives were on its board of directors, it was hardly surprising that this plan was in full agreement with the New Haven Plan Committee's recommendations. Following the date fixed for filing briefs, the Providence, Warren & Bristol Railroad Company filed a plan of reorganization on January 31, 1938, which plan accepted the principal Debtor's proposals with the exception of the disposition of its claim for breach of lease against the New Haven. The Providence, Warren & Bristol's Board of Directors, on which were the New Haven's representatives, believed that surrender of this claim without compensation should not be required. Rather, they thought, the few public stockholders should be allowed to participate in the proposed new second preferred stock and so stated in their plan. On February 28, 1938, the Commission held brief hearings on these two plans, but since most of the evidence with respect to these roads had already been introduced in connection with the principal Debtor's plan, no startling testimony was adduced.

By January 15, 1938, all parties participating in the hearings on the Debtor's plan filed their briefs with the Commission. Among them was that filed by the Insurance Group which substantially amended its proposed plan of reorganization of November 5, 1937. The Group revised downward its proposed capitalization to $343,000,000 and reduced its allowable fixed charges to $8,000,000. In addition, the Group modified the amounts, terms and characteristics of fixed interest bonds it deemed desirable and recommended for the first time, the issuance of income bonds. Lastly, it proposed

revised treatment of three underlying issues, the Danbury & Norwalk, the New Haven & Northampton and the New England Bonds. However, neither this Group nor any other party altered its stand on the basic question of the Old Colony's position in the system.

Over one year after the Debtor's plan was filed, Examiner Wilkinson, on June 11, 1938, handed down his proposed report, recommending that no plan of reorganization be approved for the principal or secondary Debtors. Mr. Wilkinson based his report on the opinion that "the chaotic condition of the principal Debtor's revenues are such that it is impossible at this time to estimate reasonably the future level of its earnings without which it is impracticable to formulate a plan of reorganization which would be fair to all the parties concerned." In addition, he felt that most parties had indicated that Old Colony should be acquired primarily to obtain its lease of the Boston and Providence whose properties were deemed essential to New Haven's through traffic,* but with the petition of the Old Colony's Trustees on May 3, 1938 for authority to reject this Boston and Providence lease, he thought a re-examination of the Old Colony question would no doubt be essential if the Court permitted this rejection.

Thus, one year's labor terminated without tangible results, although it did establish the basis for future efforts to reorganize the New Haven.

Probably this was a desirable result, for to predicate any reorganization upon the current state of the New Haven's earnings would have been most unfortunate. 1938 was a year of abnormally low earnings for the Company. While the gross operating revenues of about $73,000,000 were not as low as those of 1935, the net operating income was many millions of dollars less and the New Haven reported a deficit for the year of over $11,600,000. The vicious hurricane which swept over the New England states in that year caused untold damage generally and several millions of dollars' damage specifically to the New Haven's property, but a general decline in revenues from the preceding year was also responsible for the road's poor showing. The trend in earnings was apparent to Examiner Wilkinson since the Company's monthly statements showed losses right up to the time the proposed report was issued. To have attempted to formulate a plan in such circumstances would have been the height of folly. Under existing conditions the delay was not only unavoidable but desirable.

With Examiner Wilkinson's recommendation, progress on the plan had to be laid aside for the time being. Activity in the administration of the bankrupt estate, however, was far from static, particularly with respect to litigation ancillary to the main plan which was being pressed.

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* On this point the Insurance Group had cited in its brief an interesting statement made in "*The Formation of the New England Railroad Systems*" by Baker (1937) when the author stated with respect to the original lease by New Haven of Old Colony in 1893 (p. 43):

"Whether it [The New Haven] would have taken the Old Colony eventually, even if the latter had not leased the Boston & Providence, is problematical. The New Haven wanted the forty-four mile Boston & Providence Railroad."

In other words, what was true originally with respect to Old Colony held true even in 1938, at least up until the disaffirmance of the Boston and Providence lease.

CHAPTER VI.

SOME SIGNIFICANT DECISIONS IN THE NEW HAVEN CASE.

(1) Connecticut Railway & Lighting Company Litigation.

Concurrently with the abortive attempt to formulate a reorganization plan for the New Haven, important litigation had been in process in the District Court. For example, the almost metaphysical question of how one should evaluate a claim for breach of a nine hundred and ninety-nine year lease was then grist in the judicial mill. The New Haven was lessee under a lease for this extended term from the Connecticut Railway & Lighting Company, entered into in 1906. On November 18, 1935 the New Haven Trustees reported to the District Court they had rejected this lease, which rejection the Court duly approved, and on November 16, 1936 the lessor repossessed its properties, having formed an operating organization. The time to file claims against the principal Debtor had expired but, nevertheless, this lessor did file a claim for damages for breach of this lease in the Fall of 1936. This presented for the first time, to any court, the issue of the provability of a claim for damages for breach of lease under the provisions of Section 77 and, also, the amount allowable under such a long-term lease.* Prior to amendment of the Bankruptcy Act such a claim for breach of lease was not a provable claim unless there was a personal covenant of indemnity, but under the provisions of Section 77 Judge Hincks ruled that a claim for breach of lease constituted a provable claim even in the absence of such a covenant. Upon the question of allowable damages, the Court pointed out the difficulties of formulating a reasonable estimate. He noted that under Section 77B of the Bankruptcy Act (now Chapter X) a claim for breach of lease was limited to three years' rent, while under Section 63 of the Bankruptcy Act landlords claiming for unpaid rent in ordinary bankruptcies were limited to a claim for one year's rent no matter what the term of the lease. However, the Court pointed out, no such limitations could be found within the terms of Section 77. Section 77 referred only to actual damages, he stated, and since the only actual damage proved was for the accrued rent, he refused to allow any claim for the remainder of the term of the lease.

The claimant appealed, of course, to the Circuit Court of Appeals for the Second Circuit and on March 7, 1938, that Court affirmed the Dis-

* Section 77(b) provides: "The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.* * * in case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such non-adoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings."

trict Court's ruling.* Certiorari was granted by the United States Supreme Court and in an opinion of January 3, 1939, the Supreme Court reversed both the District and Circuit Courts and held that "actual damage" meant the ascertainable, not the merely accrued, damages.** The Court stated that the proper measure of damages was the difference between the rental value of the property for the unexpired term, discounted to date, and the present value of the rent for the remainder of the term and remanded the case to the District Court.

Upon return of the proceedings to the District Court, Judge Hincks made an even more drastic ruling. The claimant presented evidence only with respect to the past history of the Company's operations and presented no expert testimony as to anticipated earnings. The Court then held that this proof was insufficient to sustain the burden imposed upon such a claimant since it was inadequate for the purpose of estimating the rental value of the property for the unexpired term of nine hundred-odd years and refused to allow a claim in any amount, even for the accrued unpaid rental since the commencement of the proceedings.

Again the Lighting Company appealed to the Circuit Court and the Circuit Court on February 13, 1940 reversed the District Court.*** It admitted that it was impossible to estimate the rental value of the properties for the unexpired term of the lease, a period greater than that which has passed since the Battle of Hastings, but felt that the Company could not be cut off without damages for this reason alone. That Court held that in addition to accrued damages since the lease's rejection, damages must be allowed for the rental value for a certain, if an arbitrary, number of years in the future, based upon past experience as to the Company's earning power. The Circuit Court stated that it considered an estimate of the ensuing eight years' rental value possible and therefore decreed that the difference between this and the actual rent should constitute the measure of damages.

Once more the case was taken to the Supreme Court, this time by the New Haven Trustees. The majority of the Court on January 6, 1941 affirmed the Circuit Court and approved the basis adopted by the lower court for fixing the amount of the claim.† Mr. Justice Frankfurter dissented on the ground that it was unfair to cut off the claimant entirely but it was equally unreasonable to adopt an arbitrary limit on its damages. He advocated a new trial and additional evidence. Justices Douglas and Black dissented on the ground that damages could not be limited to any term and that the evidence submitted was not sufficient to warrant an estimate as to future value. They, too, advocated a new trial, but on the theory that the evaluation should be made on the same basis as would be made for the sale of the

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* *In re N. Y., N. H. & H. R. R. Co. claim of Connecticut Ry. & Lighting Co.*, 95 F. (2d) 483.

** *Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U. S. 493.

*** *Connecticut Railway & Lighting Co.* v. *Palmer*, 109 F. (2d) 568.

† *Palmer* v. *Connecticut Railway & Lighting Co.*, 311 U. S. 544.

property since they considered a lease for nine hundred and ninety-nine years the equivalent of the sale of a fee.

The computation of the claimant's damages on the basis approved by the higher courts presented no problem to the District Court and, when the Circuit Court's mandate was delivered to him, Judge Hincks, after a hearing, by an order entered March 11, 1941 (in conjunction with an earlier order of September 30, 1938), entered a judgment allowing a common claim of $4,589,319 for the breach of the lease. The adjudication made in this proceeding set the pattern for the treatment of all other claims for breach of lease in the case,* as well as settling a hitherto uncertain legal question and creating a precedent for other cases. This was but another of many important adjudications which were made in the New Haven proceeding.

(2) Disaffirmance of Boston and Providence Lease.

As Examiner Wilkinson pointed out in his "Proposed Report" of June 11, 1938, the District Court had held a hearing on May 24 and 25, 1938, upon the report of the Trustees of their administration of the Old Colony and Providence, Warren and Bristol properties. This hearing was the culmination of a series of petitions and answers which had been pending before the Court for some time. On October 7, 1937, Bankers Trust Company, as Trustee of the New Haven's First and Refunding Mortgage, filed a petition requesting that the New Haven Trustees be directed to cease all payments on Old Colony's behalf under the Boston and Providence lease. The Court issued an order to show cause on this petition and various parties filed answers and replies to it. A hearing was held December 23, 1937, but the Court felt that the record was insufficient to justify even temporary relief and asked the Trustees to file an accounting of their operations of Old Colony and its leased properties up to December 31, 1937. The Interstate Commerce Commission, on April 5, 1938, approved the segregation formula and, with this encouraging ruling, four days later the New Haven Trustees filed their administration report, as ordered. Thereafter, on May 3, 1938, they filed an amended answer to the Bankers Trust Company petition recommending that all payments under the Boston and Providence lease be withheld and that the lease be rejected. At the hearings on May 24 and 25 the segregation formula was considered as well as the Bankers Trust Company petition and representatives of the Old Colony Railroad, its stockholders committee and the Boston and Providence appeared and were heard, as well as the numerous representatives of other creditor interests who attended the hearing. The New Haven accounting showed

* The measure of damages approved by the Supreme Court was applied in connection with the determination of the Old Colony's breach of lease claim. That lease had more than 40 years to run when Judge Hincks considered the question. Under his computation the Old Colony claim amounted to $47,186,963, allowing no rental value for the lines.

a loss of over $5,400,000 charged to the Boston and Providence. In the face of this deficit operation the Court, on July 2, 1938, directed the Trustees of Old Colony to reject the Boston and Providence lease.*

Thereafter, on July 27, 1938, following actual rejection of the lease, the Old Colony Trustees filed a petition requesting that the deficit incurred in operating the Boston and Providence be made a prior lien and charge upon the earnings and property of that railroad. Before this petition came on for hearing the Boston and Providence was put in bankruptcy by a petition filed by the Provident Institution for Savings on August 4, 1938, in the United States District Court for the District of Massachusetts. On the strength of this proceeding the Boston and Providence filed objections to the Trustee's petition, primarily on the theory that the Massachusetts District Court had exclusive jurisdiction of the Boston and Providence properties and, therefore, Judge Hincks had no jurisdiction to impose a prior lien thereon. However, Judge Hincks, in a memorandum of decision entered January 16, 1939, overruled these jurisdictional objections on the ground that he first acquired exclusive jurisdiction of the New Haven's leasehold estate and the obligation to insure continued operation of the Boston and Providence, pursuant to the requirements of the law** had as its corollary the protection of the operating railroad against loss from the cost of operation. This original jurisdiction, he ruled, survived institution of the Boston and Providence bankruptcy proceedings. Having been the first Court to acquire jurisdiction it could not be deprived thereof by a court of concurrent jurisdiction.

The Boston and Providence Bankruptcy Trustees, Messrs. Bentley W. Warren and Charles F. Mulcahy, filed an appeal from this order to obtain a higher court's opinion on the jurisdictional question. Thereafter, a hearing was held before Judge Hincks on the merits of the New Haven Trustees' petition and over the objections of the Boston and Providence Trustees the Connecticut District Court, on April 25, 1939, entered its order approving the Trustees' accounts and imposing a lien on the Boston and Providence for the deficits. Again appeals were taken to the Circuit Court of Appeals for the Second Circuit and that Court, on December 18, 1939, affirmed the District Court's ruling on the legal point of its jurisdiction to impose the lien.*** However, it reversed on the merits, that is with respect to the exact amount of the New Haven's claim, on the ground that Boston and Providence had not had its day in court to

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* Investigation of the historical background of this lease led Mr. Baker in his work *"The Formation of The New England Railroad Systems"* to make this observation (p. 42):

> "In 1888 it [the Old Colony] leased the Boston & Providence and thereby acquired control of competition and prevented the New Haven from a shore line entry to Boston except upon terms satisfactory to the Old Colony,* * * at a rental which reflects some competitive bidding.* * * As railroads go, the Boston & Providence had had a relatively successful financial career, but hardly successful enough to warrant such a valuable lease."

** Section 77(c)(6).

*** *Palmer, et al.* v. *Warren, et al.*, 108 F. (2d) 164.

attack the validity of the Trustees' administration account. The Court's opinion appeared to intimate that Boston and Providence could attack the segregation formula itself, upon which the administration account was based, but upon the New Haven's petition for rehearing the Circuit Court clarified this by stating, on January 25, 1940, that it meant that Boston and Providence could only assail the application of the formula in the liquidation of its account, not the formula itself.

The Boston and Providence Trustees were successful in obtaining a writ of certiorari from the Supreme Court with respect to the jurisdictional question.* To their disappointment, however, on April 29, 1940, that Court upheld the District Court's jurisdiction, ruling that under the statute the Connecticut Court had custody of all properties of the New Haven covered by leases and was required to operate those properties; therefore, to insure payment for the administration expenses of this operation, the Court could protect itself and its Trustees by imposing a prior lien for all administration expenses.**

When the proceedings were returned to the District Court for a hearing on the merits, the parties entered into a limited stipulation as to their reciprocal claims. It was agreed that the New Haven's administration claim to January 31, 1940 should be evaluated at $7,000,000 and the Boston and Providence's claim for breach of lease at $10,000,000, but only for the purpose of voting on their respective reorganization plans. It remains to be seen whether there will be further litigation on the Trustees' administration report with respect to Boston and Providence. The Court having jurisdiction of the Boston and Providence's reorganization proceeding on February 26, 1948 refused to approve the plan certified to it by the Interstate Commerce Commission and returned the proceedings to the Commission. A new plan is now in order for the Boston and Providence. With the realization that such an event might transpire the New Haven's Reorganization Committee and the Interstate Commerce Commission in consummating the New Haven's plan had the foresight to provide for just this eventuality by leaving flexible the provisions for the issuance of new securities to acquire the Boston and Providence's properties.

(3) The 88 Stations Case.

Realistically accepting the fact that the Old Colony was a severe drain on the New Haven system, the New Haven Trustees, at the request of the Mutual Savings Bank Group and others, early in 1937 began to cast about for further means of economizing on Old Colony operations. The results of their studies, embodied in a report entitled "Survey of the Old Colony System Operations", showed that savings of well over $1,000,000 could be effected by certain changes in passenger service operation involving the discontinuance of some service and modification of other. In this connec-

* *Palmer* v. *Palmer*, 305 U. S. 578.
** *Warren* v. *Palmer*, 310 U. S. 132.

tion the Trustees filed a petition with the Massachusetts Department of Public Utilities on December 28, 1937 in which they proposed termination of service on 88 stations of the Old Colony, New England and Boston and Providence lines in Massachusetts and certain time-table changes affecting other stations. When the hearings on this application dragged on interminably and losses continued to mount, a petition was filed by the Mutual Savings Bank Group, Old Colony Shareholders' Committee and Old Colony Railroad in the District Court on June 20, 1938, requesting the Court to order the Trustees to file their recommendations in the reorganization proceeding as to possible economies in Old Colony operations. This the Trustees did and their recommendations included the abandonment of fifty-three Old Colony stations in Massachusetts, five Old Colony stations in Rhode Island, twenty-five New England stations in Massachusetts and ten Boston and Providence stations in Massachusetts. The furor the Trustees' petition created in New England, particularly Massachusetts, can well be imagined. Town meetings were held, petitions of protest circulated and the state officials besieged with importuning commuters. The newspapers were filled with discussion and editorial writers devoted columns to discussing the pros and cons. After a hearing at which the Commonwealth of Massachusetts appeared in opposition, the District Court on June 9, 1938 entered an order approving the changes in passenger service recommended by the Trustees.

Massachusetts, jealous of infringement on what it considered its prerogatives over local transportation services, appealed from the order of the District Court and succeeded in obtaining a reversal in the Circuit Court.* In its opinion of January 16, 1939, the majority of the appellate court ruled that the state authorities could not be by-passed in matters so closely related to the public interest and the welfare of the citizens of the state. Judges Learned and Augustus Hand felt that there had been no finding that the accumulation of Old Colony deficits would defeat any plan of reorganization devised and that a mere finding that any plan must cut off the service producing such deficits was insufficient. The fact that the road was in reorganization did not of itself warrant an overriding of the jurisdiction of the state in matters of this kind, they ruled. Judge Swan dissented on the ground that as a matter of statutory construction it was plain that Congress intended to exclude state control over any phase of the operation of a railroad in reorganization.

The Supreme Court of the United States agreed with the majority opinion of the court below and on November 6, 1939 affirmed its decree, likewise asserting that Congress did not intend that reorganization proceedings should of themselves supersede state laws and local regulations except as a part of a complete plan of reorganization.** However, after prevailing on the courts, the public authorities found that there was little public demand that service at these stations be resumed and did not require resumption at most of them.

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* *Converse, et al.* v. *Commonwealth of Mass.*, 101 F. (2d) 48.

** *Palmer* v. *Massachusetts*, 308 U. S. 79.

(4) Bankers Trust Company Suit.

In May of 1939 the Old Colony Trustees, represented by special counsel to avoid any conflict of interest, brought an action against Bankers Trust Company of New York in a state court in Massachusetts. Bankers Trust Company, as trustee of the New Haven's First and Refunding Mortgage, was also assignee of The New Haven's lease from Old Colony which was part of the security of the Mortgage. When the lease was terminated Old Colony's Trustees asserted that Bankers Trust Company was liable as assignee for the breach of such covenants as run with the land, notwithstanding it had never taken possession of the property. This was an attempt to apply a theory of real estate law involving lease assignments to the assignment of such a lease to a trustee of a corporate mortgage.

Bankers Trust Company immediately petitioned Judge Hincks to issue an order restraining further prosecution of the action in the state court on the ground that he alone, sitting as a bankruptcy court, had jurisdiction to determine the issues pending in the Massachusetts Court. However, Judge Hincks noted on July 7, 1939, that there was no reason for interfering with the Old Colony Trustees' choice of a forum in which to prosecute their claim. The mortgage trustee appealed this decision but a majority of the Circuit Court concluded that the District Court did not have exclusive jurisdiction of the issues nor had he abused his discretion in refusing to enjoin the state court action.* Judge Patterson filed a dissent on both scores, believing that the subject matter of the suit clearly affected the rights of New Haven bondholders and therefore was exclusively within the province of the District Court. However, his views did not prevail.

Meanwhile, the New Haven Trustees had petitioned for instructions with respect to the suit since any liability of the mortgage trustee would have to be assumed by them under the terms of the mortgage and Bankers Trust Company had demanded they assume the defense of the suit. Judge Hincks on January 8, 1940 authorized the Trustees to defend the suit and retain special counsel which they did. However, the case was never prosecuted to a judgment and thus the point of law was not ruled upon, for as a part of the consummation of the Plan a stipulation was entered into by the interested parties dismissing the action.

Let it not be thought, however, that this suit was fruitless for the claim was treated as an Old Colony asset of no little value when the Commission and the parties embarked upon an attempt to determine the purchase price to be paid for all Old Colony's assets. The actual value of the claim was never determined but for the purpose of negotiation in connection with other matters the special counsel for the New Haven's Trustees offered to compromise the suit for $2,500,000. The Old Colony bondholders clearly received some benefit from the wisdom of counsel for the Old Colony Trustees who conceived and instituted the action.

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* *Bankers Trust Company* v. *Palmer*, 109 F. (2d) 136 (January 15, 1940).

(5) Undersecured Banks' Claims.

Judge Hincks, on December 14, 1945, rendered a decision on an important and interesting question of law with respect to the claims of the undersecured banks. It will be recalled that in his Order No. 1, Judge Hincks had provided that everyone holding collateral pledged by the New Haven was restrained and enjoined from disposing of that collateral until further order of the District Court. This order followed the precedent for treatment of creditors holding collateral of the debtor set in the Rock Island reorganization proceeding, which treatment was approved by the Supreme Court of the United States.* Among the creditors affected by Judge Hincks' restraining order were the Merchants National Bank of Boston, Bank of The Manhattan Company, and Rhode Island Hospital Trust Company. The first named bank held as security for its note 5,246 shares of common stock of the Boston and Providence; the second, 15,200 shares of Old Colony stock and 26,667 shares of New York, Ontario & Western stock; and the third, 6,950 shares of Old Colony stock and 200 New Haven First and Refunding Bonds. The value of most of this collateral necessarily depended upon the judgment of the New Haven Trustees as to the value to the system of the two leased lines, Old Colony and Boston and Providence, whose stock they held. However, this did not trouble these bank creditors in the early stages of the proceeding.

Strangely enough, when the New Haven Trustees sought permission to reject the Old Colony lease in June, 1936, thereby pulling the floor from under the Old Colony stock, no steps were taken by the two banks holding shares of this stock to seek a dissolution of the injunction, despite the rapid decline in the value of their collateral. But when the New Haven Trustees filed their petition of May 3, 1938, recommending that they be authorized to reject the Boston and Providence lease the Merchants National Bank, nine days later and before a decision on the Trustees' petition, filed their petition requesting just such a dissolution of the injunction. This application pointed out that the value of their collateral had declined from almost its par of $100 per share when the injunction issued, which price had continued right up to November, 1937, to $35 per share on May 10, 1938 and pleaded that further restraint upon the disposition of this collateral would be inequitable. Despite this showing, Judge Hincks considered that as long as there was a possibility that the Boston and Providence might be retained in the system, the New Haven's stock interest therein should be preserved for voting purposes in connection with any new lease to New Haven. For this reason, although regretting the hardship to the banks, he denied the request on July 19, 1938 with leave to renew. Merchants Bank filed its notice of appeal and assignment of errors but instead of pressing the appeal, on August 25, 1938 it renewed

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* *Continental Illinois National Bank and Trust Co.* v. *Chicago, Rock Island and Pacific Railway Co.*, 294 U. S. 648.

its motion to lift the restraining order because in the interim the District Court had authorized rejection of the Boston and Providence lease and the Boston and Providence's own reorganization proceeding had been instituted. This, the Merchants Bank contended, removed the control of the Boston and Providence from its stockholders to its trustees in bankruptcy, thereby eliminating the basis for the Court's earlier decision. Judge Hincks was not convinced and decreed that the possibility that the New Haven's stock interest might aid in facilitating a system reorganization warranted continuation of the injunction. This time Merchants Bank did prosecute its appeal and, after argument, the Circuit Court of Appeals on April 3, 1939 reversed Judge Hincks' ruling.* With the decline in value it was plain, the Court said, that the New Haven had no equity in the collateral and therefore the sale of this stock would have no effect on the preparation and adoption of a plan of reorganization.

This was, however, a hollow victory for the bank since by that time the value of the collateral had declined even further and there was no market for the large block of Boston and Providence stock it had to offer. The other two banks' creditors, theoretically at least, also benefited from the Circuit Court's decision but, as a practical matter, they did not since the same market conditions prevailed as to their Old Colony stock as prevailed with respect to Merchants Bank's Boston and Providence stock. All three banks thus were obliged to retain their collateral.

When the Commission issued the plan contained in its Third, Fourth and Fifth Supplemental Reports, it treated these banks solely as unsecured creditors except to the extent of the First and Refunding Bonds held by Rhode Island Hospital Trust Company. This was indeed a bitter blow to the banks which, when the restraining order was issued in 1935, had been well secured creditors. In fact, Merchants National Bank had been secured in full, the Rhode Island Hospital Trust Company to the extent of 95% of its note and Bank of Manhattan's collateral was worth about 83% of its debt, based upon the then current market values. The banks filed strenuous objections to their classification as unsecured creditors and to the Commission's treatment of their claims. Judge Hincks, relying on the precedent in the *Rock Island* case, overruled the objections of the banks and held that any decline in the value of their collateral during the pendency of the injunction was at their expense and not that of the other creditors. With this position the Circuit Court of Appeals did not agree and in their decision of January 2, 1945, Judge Hincks was reversed on this point.** The appellate court unanimously agreed that it would be inequitable to saddle the loss resulting from the restraining order on the banks when the injunction could only be justified on the theory of benefit to the Debtor's estate. If the theory upon which the injunction issued was correct, the Circuit Judges said, then the loss should be borne by those parties for whose benefit the restraint was imposed. In a subsequent opinion,** at the

* *Merchants National Bank of Boston* v. *N. Y., N. H. & H. R. R. Co.*, 102 F. (2d) 923.

** *In re N. Y., N. H. & H. R. R. Co.*, 147 F. (2d) 40, 53.

request of the New Haven's Trustees, the Circuit Court on January 23, 1945 ruled that the Trustees might deal with the claims of these banks as administrative matters rather than in connection with the plan of reorganization. By this move the Trustees wisely separated the important legal question raised by these banks as to who should bear the loss resulting from injunctions of this character from the main plan of reorganization, thereby enabling it to proceed regardless of the outcome of that litigation. Consideration was given to the desirability of petitioning the Supreme Court for a definitive decision on this point of law but it was determined to defer any such action until a final adjudication in the District Court on the banks' claims.

The disposition of the banks' claims was brought on for hearing in the District Court May 18 and 19, 1945. At that time extensive testimony was given as to the value of the banks' collateral during the early period of the reorganization proceedings. Judge Hincks felt that the only issue which the Circuit Court had left him for decision was the extent of the damage suffered by each bank, although it would appear that the question whether or not the banks would have sold their collateral absent the injunction was also an issue to be resolved. The New Haven Trustees' counsel renewed again his argument that the decline in value of this collateral was an unfortunate risk which must be borne by the banks, thereby preserving the issue for subsequent appeal, but on December 14, 1945 Judge Hincks rendered his decision awarding the banks extensive damages. From this order the New Haven's Trustees filed their notice of appeal. It then appeared that this question, which, strangely enough, has never been brought to the Supreme Court in any of the numerous reorganization proceedings, would finally be resolved. However, the New Haven Trustees in February 1946 petitioned for authority to settle the various bank claims on a compromise basis which they believed fair in all the circumstances and on February 19, 1946 Judge Hincks granted the petition. Apparently the final solution of this knotty legal problem will have to await the next cycle of railroad reorganizations although the decision of the Circuit Court of Appeals still stands as an important precedent.

CHAPTER VII.

THE DEBTOR'S AMENDED PLAN OF REORGANIZATION.

Under Examiner Wilkinson's proposed report of June 11, 1938, refusing to approve a plan, exceptions were required to be filed by July 5, 1938, but the Commission never held a hearing on this report or the exceptions to it. A hearing was scheduled for October 21, 1938, but ten days prior to that date the Commission granted the Debtor permission to file a revised plan. Such a plan was filed December 31, 1938 and in it the Plan Committee made three drastic revisions from its previous plan. First, it

stated that the New Haven was unwilling to take over the Old Colony properties until it was relieved from all obligation to operate passenger service on the so-called Boston Group. Secondly, a reduced capitalization of just in excess of $400,000,000 (including securities to be issued to acquire the Boston and Providence) was approved by the Debtor's plan. Lastly, the Debtor revised its conclusion that an equity existed for the common stockholders and stated that such stockholders were not entitled to participate. In addition, the management cut their estimate of permissible fixed charges and rentals from almost $10,000,000 to $6,400,000 annually. These amendments, as well as the result of further application of the segregation formula to current earnings, necessitated revision in the treatment of various creditor interests. With respect to the secondary Debtors, Providence, Warren & Bristol and Hartford and Connecticut Western, the amended plan contemplated acquisition of their properties in satisfaction of the administration claims against them, leaving their stockholders only with a claim for breach of lease to be satisfied in new Common Stock.

This amended plan brought forth the expected volley of proposals and plans. One view common to all creditor parties was that the Plan Committee erred grievously in finding the existence of an equity for the preferred stockholders. The Old Colony Railroad Company retreated from its original plan of complete merger with the New Haven and now suggested merger of all its properties except the disastrous Boston Group. This Group would be retained by Old Colony and operated by New Haven for Old Colony's account until abandonment on January 1, 1941. Old Colony's bondholders would receive treatment identical with that accorded the New Haven's own First and Refunding Bonds. The Mutual Savings Bank Group concurred in this proposal while the Independent Bondholders' Committee and the Trustee of the New Haven's First and Refunding Mortgage joined with the Insurance Group in favoring abandonment of all ties with Old Colony. Various other creditors offered suggestions and the Pennsylvania Railroad renewed its plea that the old common stock be given recognition.

The Commission fixed June 14, 1939 for the commencement of hearings on the amended plan, the substitute plans and parties' proposals. Just prior to the opening of the hearings there were filed with the Commission the important studies with respect to Old Colony made by the Court's Committee of Experts. These studies were prompted by the original report of Examiner Wilkinson. When the discouraging facts regarding the New Haven's earnings were emphasized by the Examiner in his first report in June, 1938 and it was plain that the Old Colony properties and its lessors were parasitical arms of the New Haven, Judge Hincks, of his own motion, took steps to ascertain whether the parasites could be transformed into worthwhile additions to the body of the system. In an order entered August 11, 1938 he found that "To accomplish an equitable and feasible reorganization of the New Haven System, in whole or in part,

further research and studies will be required covering the operations of, and possible economies upon, the properties of Old Colony, Boston and Providence, and Providence, Warren & Bristol." Carrying out this conclusion, he designated Professor Cunningham of Harvard to serve as Chairman of such a group of experts as the parties might designate to advise the Court as to the desirable scope of such studies and the method to be pursued in their development. The Mutual Savings Bank Group selected Professor Cunningham as its representative and the Insurance Group nominated Miles C. Kennedy, one of their experts at the hearings on the plan.

After certain preliminary surveys had been made the scope of the studies was defined by the Court in its Orders of November 1, 1938, and March 13, 1939.* When these extensive studies were completed after ten months' concentrated effort they were submitted to the Court and by Order of June 9, 1939, Judge Hincks directed the Clerk to accept them for filing and to transmit copies to the Interstate Commerce Commission.

A more complete and impartial study of Old Colony operations would be hard to find. The experts' uncontroverted segregation study showed that Old Colony in 1938 operated at a deficit of almost $2,500,000 and a similar deficit in 1937. The Boston and Providence deficit was only slightly less than Old Colony's, while Providence, Warren & Bristol had comparable deficits in relation to its size. Severance studies showed that in its

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* The comprehensive nature of these studies is clearly shown by the directions given by Judge Hincks. The Experts Committee was directed to:

1. Bring the segregation studies up to date by the compilation of data and the preparation of monthly reports showing segregated revenues, costs, and net income of all mortgage divisions and leased lines, including the Old Colony, Boston & Providence, and Providence, Warren & Bristol.

2. Make a field survey of physical property of the Old Colony, Boston & Providence, and Providence, Warren & Bristol. Such a survey would serve as a basis (a) for estimating future maintenance costs; (b) for forecasting future capital expenditures; (c) for determining the extent to which real estate and other properties might be sold or leased; and (d) for consideration of modifications in maintenance standards, operating methods, and operating and administrative organization.

3. Make a survey of locomotives and cars now in use on the Old Colony, Boston & Providence, and Providence, Warren & Bristol. Such a survey would serve as the basis for ascertaining (a) whether the existing inventory of equipment was greater or less than was justified by present and prospective traffic; (b) whether it was of the type best suited to the character of the traffic; and (c) what, if any, other types would produce better results.

4. Prepare segmentary studies which are a segregation of revenues and expenses by sections of the lines of the Old Colony, Boston & Providence and Providence, Warren & Bristol as a basis for determining which sections are or may be made profitable and which are or may continue to be responsible for deficits in income.

5. Complete an analysis of the less-than-carload (L. C. L.) freight traffic on the Old Colony, Boston & Providence, and Providence, Warren & Bristol.

6. Complete a survey of materials and supplies on the Old Colony, Boston & Providence, and Providence, Warren & Bristol to serve as a basis for determining the reasonableness of inventory balance and costs of distribution.

7. Make further studies of operating expenses and other costs of the passenger facilities in Boston and of the possibilities in coordination of such facilities with those of other railroads.

8. Estimate, in the light of recent developments, the effect upon the operation of the New Haven property and upon that of the Old Colony if the latter were operated independently or in conjunction with some other railroad than the New Haven.

best year, operating as an independent carrier, Old Colony's deficit would be reduced less than a quarter of a million dollars, while New Haven would profit by relief from the Old Colony deficit to the extent of almost $700,000. The experts had gone further than studying Old Colony and its lessors as one unit. They had broken the Old Colony and Boston and Providence into groups according to geographical regions served. Again it was confirmed that the major factors in the deficit operation of Old Colony were the lines from Boston to Middleboro and Plymouth and a few short branches of these lines, although it was made plain that passenger service on all parts of the Old Colony was completely unprofitable. The only inference to be drawn from the experts' reports was that the Old Colony could not be successfully operated as a passenger line without a serious drain on the New Haven's resources.

So these studies were in the record before the Commission at the opening of the hearings in June 1939 when the Debtor put in its evidence in support of its amended plan. This evidence was not vigorously challenged by any party in interest and the other parties thereafter proceeded to put in their cases. Throughout the four days of hearings the divisional bondholders' representatives, the Independent Bondholders' Committee, the Mutual Savings Bank Group, the Commonwealth of Massachusetts, the various bank creditors and others adduced evidence to support their positions. When all testimony was completed, Commissioner Mahaffie closed the hearing on June 17, 1939 with a provision that briefs were to be filed by October 1, 1939, and 33 parties filed separate briefs with the Commission in accordance with this order. Under this weight of paper, as well as evidence, it is a remarkable tribute to Examiner Wilkinson that he was able to read, analyze and digest so successfully, the arguments and positions of all the parties and to issue his second proposed report by November 17, 1939, recommending for the first time that a reorganization of the New Haven be attempted.

CHAPTER VIII.

INAUGURATION OF THE BOSTON TERMINAL COMPANY CONTROVERSY.

Just prior to the issuance of the Examiner's second report, the Trustees instituted proceedings which precipitated one of the most hotly contested issues in the New Haven proceeding. On October 17, 1939, they filed a petition requesting Judge Hincks for directions as to whether they should continue to advance funds to pay Old Colony and Boston and Providence taxes amounting to approximately $700,000 and the proportion of taxes and bond interest of the Boston Terminal Company for which these railroads were liable, amounting to $837,000 annually. It was the dispute over the latter payments that presented a primary source of

interest and litigation for several years to come. To appreciate the nature of the issue involved in this aspect of the New Haven's reorganization some understanding of the origin of this liability for the Terminal Company's obligations must exist.

In the year 1896 there were four railroads entering the southern part of the City of Boston—the Boston & Albany, the New England, the Boston and Providence, and the Old Colony. Each of these four railroads had a separate terminal and each terminal was located at a considerable distance from the others. All four terminals were of ancient vintage and inadequate even for their own limited purposes. In the approaches to these terminals, not only were there crossings at grade over busy city streets, but also the tracks of one railroad crossed those of another. Thus, the existing railroad terminal accommodations were both inconvenient and unsafe with respect to the general public, as well as to those traveling on the railroads. Recognizing this situation, the New Haven, by one of its early presidents, Mr. Charles P. Clark, initiated action to establish a union terminal. It was logical that the New Haven would take this lead since four of the five railroads entering Boston on the south were under its common management. The Boston & Albany and City of Boston were eventually persuaded to join in recommending appropriate legislation for the establishment of a union terminal, a facility highly desirable from a transportation and economic viewpoint. The legislature of Massachusetts in 1896 passed a statute entitled, "An Act to Provide for a Union Station for Passengers on Railroads Entering the Southerly Part of the City of Boston."* The Governor of the Commonwealth approved the statute on June 9, 1896, and construction of the terminal began shortly thereafter. The structure so erected is the present South Station in Boston.

The Terminal Company Act authorized the five railroads entering Boston to subscribe for one-fifth each of the capital stock of the Company, which was fixed at $500,000. The New Haven was included as a subscriber to the stock because of its lease of Old Colony which gave it entry into Boston. The Act referred to the New Haven as "being lessee of the Old Colony Railroad Company." It was around this phrase "being lessee" that much subsequent dispute as to the Terminal Company problems revolved. The Act went on to impose on the using companies an obligation to meet, in proportions based upon use of the facilities, the bond interest, taxes, and operating expenses of the Company as well as a dividend on the common stock not to exceed four per cent. The Act further provided that in the event any mortgage secured by the Terminal properties should be foreclosed, the using railroads were to be liable directly to the bondholders for any deficiency. In 1931, the Massachusetts Department of Public Utilities, under the jurisdiction given it by the Boston Terminal Company Act, determined that the proportion of use of the terminal facilities for the

* Chapter 516 of the Massachusetts Acts of 1896.

purpose of making the required payments should be fixed at 70% by the New Haven and 30% by the New York Central as lessee of the Boston & Albany, and both railroads had faithfully observed their commitments. However, the studies of the Committee of Experts had revealed that the Terminal costs were one of the major factors in making Old Colony's passenger service a losing proposition. Such was the background of the matters involved in the Trustees' petition of October 17, 1939 when the hearing on that petition opened before Judge Hincks on October 26, 1939.

Opposition to the Trustees' petition was primarily represented by the Old Colony Railroad Company, its Protective Stockholders' Committee, the Trustee of the Boston Terminal Company First Mortgage, and the Corporation Counsel of the City of Boston. But all arguments of these parties against the Trustees' petition were overruled, the Court holding on October 30, 1939 that since the New Haven's Terminal obligations existed only "as lessee" of Old Colony (and thereby as sublessee of Boston and Providence), termination of the lease terminated all liability of New Haven to make its lessors' payments with respect to the Boston Terminal. Nor did he find anything in Section 77 which imposed upon a debtor, obliged by the statute to operate a lessor railroad, the further obligation to meet claims of creditors of the lessor, payment of which was not indispensible to the operation of the lessor, for, he stated, Congress apparently was only interested in continued operation.*

Of course, if the New Haven were to acquire the Old Colony and Boston and Providence properties, it would have to make arrangements for the payment of their taxes which would be a first lien on those properties. But the ruling with respect to payment for the use of the Terminal Company facilities raised for the first time an issue which could be dealt with in a reorganization plan, involving as it did the question of a fixed charge which would be imposed upon the New Haven for such use—whether payment should be made at the statutory rate provided in the Boston Terminal Company Act or whether at a different rate set up in a plan of reorganization. Any revision of the terms for the use of these terminal facilities by the Interstate Commerce Commission would be an attempt by a federal authority to override an obligation imposed by a state legislature, thereby presenting an interesting question of constitutional law. As has been seen, the issue was decided indirectly by the Supreme Court in the *"88 Stations"* case where it indicated that state regulation would have to yield to an exercise of the federal power over bankruptcies in "a complete plan of reorganization."

From the New Haven's point of view the District Court's order was a highly satisfactory curtailment of operating expenses but from the

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* Once again it is of interest to note the trend of the price of securities affected by the New Haven proceedings. In 1937 when the Debtor filed its plan the two issues of Terminal Company Bonds were selling at approximately 103 and 106, respectively. In November of 1939 following Judge Hincks' ruling the bonds had sunk to 63 and 73, respectively. By the time the Commission came out with its first plan in 1940 a price of 34 was generally quoted.

standpoint of the Terminal Company the order was ruinous. Without these payments it was, to say the least, financially embarrassed and proceedings for its reorganization were begun shortly thereafter in the United States District Court for the District of Massachusetts. The petition for reorganization of the Terminal Company was approved November 20, 1939.

An appeal from the District Court's order was taken to the Circuit Court of Appeals by the Boston Terminal Company's First Mortgage Trustee, Webster and Atlas National Bank, and on April 16, 1940 that Court reversed the District Court.* The judges of the appellate court felt that, since the New Haven was obliged to operate the Old Colony and Boston and Providence under the Bankruptcy Act, it was put in the same position as trustees of those roads' properties and subject to the same obligations. These obligations included, they said, payment of taxes and the payments required by the Boston Terminal Company statute. Under this view, the Court did not feel it necessary to decide whether or not rejection of the Old Colony lease terminated New Haven's obligations "as lessee."

On such an important issue the Trustees necessarily sought review in the court of last resort and the United States Supreme Court granted their petition for certiorari. After argument, on February 3, 1941, that tribunal delivered an opinion unanimously reversing the Circuit Court of Appeals and reinstating the order of the District Court.** The Supreme Court agreed with Judge Hincks that compulsory statutory operation of its lessor's properties did not subject the New Haven to all of the obligations of those roads and certainly did not require the advancing of funds to meet expenses not essential to operation of those railroads.

With this ruling a red flag was waved before all interested parties as a warning that if Old Colony and Boston and Providence were to be acquired by the New Haven, some revision would be necessary in the terms for the use by the New Haven and its subsidiaries of the Boston Terminal facilities. Yet, subsequently, a group of institutional holders of Boston Terminal Bonds, represented by Colonel Henry W. Anderson, of Virginia, was to contend that it had no notice that such might be the case until the Commission's Plan of October 6, 1942 was issued in its Third Supplemental Report and Order.

CHAPTER IX.

ISSUANCE OF THE COMMISSION'S FIRST PLAN OF REORGANIZATION.

Examiner Wilkinson's report of November 17, 1939 recommended a plan for the New Haven, many of the terms of which were to withstand the attacks of all parties and survive in the finally consummated plan of reorganization. The total capitalization which he suggested was fated to remain

* *Webster & Atlas National Bank of Boston* v. *Palmer*, 111 F. (2d) 215.

** *Palmer* v. *Webster & Atlas National Bank*, 312 U. S. 156, rehearing den. 312 U. S. 714.

the capitalization even to the termination of the proceedings (except for an increase in common stock required as a result of the payment of the Reconstruction Finance Corporation's claim). His conception of a proper total capitalization was $365,000,000, the amount originally proposed by the Insurance Group, composed of fixed interest and income bonds and preferred and common stocks. Within this capitalization he found there was no equity for the old preferred and common stocks of the New Haven. And most important of all, in this report the Examiner approved the position taken by the Insurance Group from the beginning, that the Old Colony properties should not be imposed upon the New Haven system. He went on to state that it was his belief that the unfavorable earnings of Old Colony did not warrant the approval of any plan of reorganization for that railroad at that time. Examiner Wilkinson also approved the principal Debtor's proposal that the other lessors, Providence, Warren and Bristol, and Hartford and Connecticut Railroad Companies, be merged at the cost to New Haven of cancellation of its administrative claims against those railroads. As a matter of fact, this treatment was settled by this report and was never again to become the subject of contention, and barely of mention, in the proceedings. Lastly, this report recommended terms for the acquisition of the Boston and Providence railroad properties.

The usual statutory procedure for filing of exceptions to the Examiner's report was followed, provision in the Report being made that this step should be taken before December 7, 1939 (with replies thereto before December 17), and the customary barrage of exceptions followed. The case was assigned for argument before Division 4 of the Commission, in Washington, D. C., on December 21, 1939. At that time some twenty-nine attorneys for various parties appeared, and twenty-one of them availed themselves of an opportunity to make statements on behalf of their clients to Commissioners Mahaffie, Porter, Miller and Eastman. Following these hearings and after weighing all arguments, Division 4 issued its first report and order on March 22, 1940 recommending a plan of reorganization for the New Haven.

In most of its principal features the plan approved by Division 4 agreed with the Examiner's plan—as to total capitalization, elimination of the old New Haven stock, the treatment of various creditors, etc. Upon the important feature of the disposition of the Old Colony problem, it was in full accord. No plan of reorganization for the Old Colony, it ruled, could be approved at that time.* The terms for acquisition of the Boston and Provi-

* The Report's statement on this score should be noted at this time to be contrasted with the diametrically opposed finding of the full Commission that there was justification for saddling the New Haven with Old Colony (p. 382 of 239 I. C. C.):

> "On the basis of the data of record, the acquisition by the principal debtor of the Old Colony's properties and the assumption of the direct responsibility for their future operation would entail the assumption of an extremely onerous financial burden which, in our opinion, would be unfair to the creditors of the principal debtor and contrary to the broad public interest, in that it may impair

dence were fixed on the theory that the alternate route over the New Haven's own lines between those two cities could only be made usable at unreasonable expense and it would not be in the public interest to so duplicate existing routes. The majority was in accord that the New Haven's outstanding preferred and common stocks were not entitled to participate in the new Company's securities. However, Commissioner Miller felt that it was wrong to conclude for all time that the earnings of the New Haven would never justify participation by those security holders. For this reason he adopted the recommendation, which had been or was to be advanced by hopeful parties in many cases, that warrants be issued to unsatisfied creditors and to preferred and common stockholders which in times of highest earnings would give them some return. The Supreme Court eventually rejected the warrant theory in another proceeding on the ground that such interests in a corporation were undesirable and there was no requirement that they be issued.*

Commissioner Eastman dissented vigorously from the Report's conclusion to eliminate Old Colony entirely from the New Haven system. It was his opinion that the public interest required that further consideration be given the Old Colony problem to see if a system which had operated for so many years (forty-two) could not be continued. For this reason he would refuse to approve any plan for the New Haven at that time and would reopen the record to receive further evidence on the prospective earning power of Old Colony at its value to New Haven. The vitality of Commissioner Eastman's views was eventually to make itself felt.

Under Section 77, a sixty-day period is allowed for the filing of exceptions to a proposed Commission plan and during the period following March 22, 1940, twenty-three parties filed petitions proposing modifications, rehearings, and rearguments. All these proposals were scheduled for a hearing before the full Commission on June 27, 1940. So extensive were the arguments of the parties, the Commission was obliged to sit for two full days.

The first indication that Commissioner Eastman's views as to Old Colony might prevail was given on August 1, 1940 when the Commission

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the ability of the principal debtor to render efficient, economical, and safe service on the remainder of its system.

To approve any of the proposals of the Old Colony, or to attempt independently to provide for the inclusion of the Old Colony in the principal debtor's system on a basis which we might think would permit the operation of its lines without undue loss, would be to ignore the public convenience and necessity without an appropriate hearing. To reopen the record in this proceeding for this purpose in the hope that the Old Colony could be reorganized as a part of the principal debtor would result, in our opinion, in unduly delaying the reorganization of the principal debtor, and would be unfair to the principal debtor's creditors.

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We conclude, therefore, that we should refuse to approve, at this time, the Old Colony's plan of reorganization or a plan of reorganization for the Old Colony, or the acquisition of all or any part of its property by the reorganized principal debtor."

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* *Ecker* v. *Western Pacific Railroad Company*, 318 U. S. 448, 476 (1942).

directed that the record be reopened to receive further evidence on the question of reorganization of Old Colony with or as part of the New Haven system. Pursuant to this order, hearings for this explicit purpose were held in 1940 before the Director of the Commission's Bureau of Finance, Oliver E. Sweet, and Examiner Wilkinson from September 9 to September 11 inclusive. The Old Colony parties were on the defensive because of the unfavorable treatment of their properties proposed by Division 4, and they assumed the burden of establishing error in this report of the Commission. They, therefore presented testimony and documentary evidence to show to their best advantage the value of Old Colony to the New Haven. The Old Colony Railroad's Plan Committee first took up the attack, introducing at the outset documentary evidence showing economies to be expected from revised passenger service and abandonments. In addition oral testimony in support was presented. Segregation results were considered and traffic prospects discussed. Professor Cunningham testified further with regard to the segregation formula for the Mutual Savings Bank Group as holders of Old Colony bonds. The Commissioner of Corporations and Taxation of Massachusetts, Mr. Henry F. Long, acted as a witness for the Special Railroad Commission of Massachusetts to relate in detail the Old Colony's tax picture and its favorable prospects for tax abatements as an inducement to retain Old Colony in the system. For the same Commission Mr. Jarvis Hunt, a member and a Senator in the Massachusetts Legislature, testified fully on the Commission's Plan to effect economies in Old Colony's operation through passenger service reduction as well as savings in grade crossing expenses, etc. Consideration was even given to the effect on national defense of abandonment of segments of Old Colony's lines. Three other members of the Massachusetts' Commission and a special consultant testified on the measures that body would take to facilitate more economical operation of Old Colony. The Old Colony labor situation was reviewed and the effect of abandonment of Old Colony on the railroad workers was considered. The Old Colony Commuters and Shippers League presented expert witnesses on co-ordination of activities to save Old Colony money and the Old Colony Shareholders Protective Committee again offered the expert, Mr. Joseph White, who discussed the segregation formula and its results at length. A more comprehensive survey of all aspects of Old Colony operation would be hard to imagine. A record of almost 500 pages of oral testimony, as well as of 29 extended exhibits, was made. All Old Colony parties were given an opportunity to protect their interests and the public welfare was more than adequately represented by the public authorities who took part in the hearing. Later complaints of lack of opportunity to be heard and offer evidence were amply refuted by the record made at these hearings.

When the hearings closed, it was agreed that the Commission would hear oral argument on October 16, 1940, and at that time eighteen arguments were made to the full Commission by attorneys for various creditors,

mortgage trustees, stockholders and public authorities. After weighing the evidence and arguments for more than four months, the Commission issued its First Supplemental Report dated February 18, 1941. Almost a full year had thus passed since Division 4 had approved a plan for the New Haven and over fifteen months since Examiner Wilkinson's report was issued, an example of how the participation of many parties, the inherently complicated nature of a railroad reorganization, and the statutory requirements result in the prolongation of a proceeding of this character.

In its approved plan, the full Commission overruled Division 4 on the fundamental policy of severance of the Old Colony from the system. It held that Old Colony should be acquired, and in so ruling adopted substantially the reasons advanced by Commissioner Eastman in his dissent of 1940, attacking the conclusiveness of the results of application of the segregation studies, weighing the results of the severance studies, and pointing out practical economies in operation. However, the Commission did recognize that passenger service on the Boston Group of Old Colony could not be continued indefinitely if it was to be productive only of deficits despite all reasonable economies. Therefore, it conditioned continuation of such service upon a finding that an estimate, to be made by the Commission at the Debtor's request, of average yearly loss in net income to the New Haven in 1941 and 1942 if Old Colony were not operated as part of the system did not exceed the estimated annual saving through the proposed economies by an amount equal to the annual contingent interest charges on the income bonds to be issued to Old Colony for its properties. If the Debtor did not make its request for such estimates before December 31, 1942, the request could be made any time before December 31, 1945, in which event the Commission's estimates were to cover the years 1941 through 1945. So the Commission's fundamental policy with respect to acquisition of Old Colony was settled and was to remain settled, subject only to changes in detail as to the price to be paid for Old Colony's properties and the conditions for operation of passenger service on the Boston Group. Commissioners Mahaffie and Porter dissented from this part of the plan on the ground that the New Haven creditors should not be burdened with the Old Colony passenger losses, but their views were to remain in the minority.

Apart from an increase in the capitalization to cover the merger of Old Colony, the Commission had approved substantially the plan recommended by Division 4.

On the same day that it issued this plan, February 18, 1941, the Commission rendered its decision on the petition of the New Haven Trustees for permission, as Old Colony's trustees, to abandon entirely operation of the Boston Group. This petition had been filed as early as October 27, 1939 and had aroused the numerous individuals and groups in Massachusetts that would be affected by a granting of the petition. The Commonwealth of Massachusetts, by its Governor, Lieutenant Governor, Attorney General,

his assistants, its Special Commission to Investigate Railway Transportation Facilities, various industries which shipped over Old Colony lines, representatives of industrial organizations, chambers of commerce, commuters, and railroad employees rose up in force to protest this action. The usual hearings were held by the Commission pursuant to the Interstate Commerce Act's provisions relating to abandonments, and a very extensive record was made of Old Colony operations over the Boston Group. On the basis of this record the Commission's Examiner, on August 1, 1940, issued his report recommending approval of the petition. Exceptions were filed with respect to this report and oral argument was heard by the full Commission on October 16, 1940. The majority of the Commission did not agree with the Examiner and felt that there was no justification for abandoning lines of railroad which could be operated profitably in freight service. Commissioners Porter and Mahaffie again dissented although without opinion.

With this ruling another attempt by the New Haven Trustees to relieve the system of a most unwelcome and unhealthy burden failed. Of course, some economies had been achieved in passenger service on Old Colony. For example, in June 1939 the Old Colony Trustees caused notice to be published of the proposed discontinuance of passenger service on the Boston and Cape groups, effective September 24, 1939. A special advisory committee, appointed by the Governor in May 1939, thereafter submitted a report which was forwarded to the Senate and House of Representatives of Massachusetts. As a result of the Governor's special message, the General Court of Massachusetts in Resolve No. 64, on August 12, 1939, created a special commission to investigate the possibilities of coordinating the transportation facilities in and around the metropolitan Boston Area, and the advisability of extending the rapid-transit system of the Boston Elevated in Boston along the right-of-way of the Providence division of the New Haven to the Readville district. In addition, this commission was to make an investigation of the operation of the New Haven, the Old Colony, and the Boston and Providence Railroads and of the incidence of taxes and other expenses on the costs of such operations, with a view to determining, among other things, what action should be taken to assure continued transportation service for the communities served, by railroad or otherwise, "particularly commuting passenger service, so called". After its study of the problem the commission was to file with the clerk of the House of Representatives, not later than the first Wednesday in December 1940, a report of the results of its investigations and its recommendations, if any, together with drafts of legislation necessary to carry them into effect.

By order, dated August 28, 1939, the United States District Court approved an agreement between state authorities, representatives of the Trustees, and representatives of the Old Colony Railroad Company and bondholders' committees, under which the Trustees agreed to withdraw the notices of discontinuation of passenger service, and the trustees and

public authorities in Massachusetts were forthwith to confer to "consider revision of service and closing of stations to be immediately put into effect to reduce the claimed losses as far as possible at once, and further, to consider the possibility of a plan by which the Old Colony can be made solvent for reorganization". The Trustees reserved the right to file with this Commission an application for permission to abandon the Boston group.

After conferences and hearings, a petition in the nature of a recommendation by the Trustees and a majority of the members of the special commission, was submitted to the Department of Public Utilities with a request for approval of an interim minimum service plan. By decision of March 7, 1940, the Department issued its order authorizing material reduction in service on the Boston Group, and some reduction on the Cape Cod Group, which includes stations east of Bridgewater and to Woods Hole and Hyannis. In that report the department stated that the greatest passenger traffic density on the entire Old Colony system is between Boston and Braintree; that between those points the largest revenues were received, even upon trains that run beyond Braintree to the more distant points in the territory; that it was not ready to concede that passenger service should end at the points where most of the passengers board or alight; and that in the interest of the entire community a railroad must operate a comprehensive service, not merely the fractional parts of its system on which the traffic is most remunerative. The department agreed substantially with the recommendations made as to service during the "rush hours", but ordered changes other than those recommended as to service during other periods of the day or evening below Braintree.

As of March 1940, on weekdays the Trustees operated into Boston 54 trains from Braintree, 9 from Greenbush, 4 from Plymouth, and 8 from Middleboro. Southbound trains totaled 54. Under the reduced schedule approved by the Department of Public Utilities the number of trains into Boston was reduced to 26 from Braintree, 4 from Greenbush, 3 from Plymouth, and 4 from Middleboro, and southbound trains were reduced to 27. Saturday service was reduced about 50 percent. All Sunday service on the South Shore and Plymouth lines, which consisted of a total of 23 trains, was eliminated, and Sunday service on the Middleboro line was reduced from 19 trains to 6 trains. Annual passenger train-miles operated were reduced 384,333 by the plan of operation approved by the Department. This was a reluctant step in the right direction by the Commonwealth, but it barely dented the surface of the Old Colony problem.

CHAPTER X.

DISAPPROVAL OF THE COMMISSION'S PLAN OF REORGANIZATION.

The plan of the Commission of February 1941 (except as modified in a minor respect by a Second Supplemental Report of the Commission of March 25, 1941) was certified to the District Court for approval. Very few of the parties affected by the plan voiced approval. The Mutual Savings Bank Group did file a statement asking the Court to give its approval, and at the hearings the Old Colony Railroad Company also appeared in support of the Commission's plan. For the most part, however, dissatisfaction prevailed, and the other parties filed with the Court their many exceptions and briefs in support thereof. Prior to the hearings scheduled for June 2, 1941, thirty-one parties filed objections either to specific features of the plan or to the plan as a whole. So complete an airing was given the separate views of the parties that the approval hearing lasted for three full days. The principal New Haven creditors contended that the imposition of the Old Colony losses on the New Haven was an improper appropriation of moneys pledged to the secured New Haven creditors and that any plan providing for the assumption of such liabilities without a workable or reasonable limitation thereon could not be approved as fair and equitable. The material presented to the Court from the record before the Commission by counsel for the New Haven parties showed impressively the need for some mechanism as a part of any fair plan for the New Haven whereby the burdens which it would assume in undertaking the operation of the Old Colony and the Boston and Providence could be limited. The parties arguing for such joint operation, Old Colony representatives and representatives of the Commonwealth of Massachusetts, maintained that the suggestion as to modification of service made by the Commission in its plan gave sufficient assurance that these burdens would be diminished so that the plan proposed by the Commission could be approved by the Court.

Appointment of Compromise Committee

After two days of hearings, Judge Hincks was apparently convinced that a plan for joint reorganization of the principal and secondary Debtors could not be approved without a definite limitation upon the burdens which the New Haven would assume. For this reason he appointed a "Compromise Committee" consisting of Edwin S. S. Sunderland, of counsel for the Insurance Group, Charles A. Coolidge, of counsel for the Old Colony Plan Committee, J. Burke Sullivan, an Assistant Attorney General of Massachusetts, and Harry W. Dorigan, Executive Assistant to the Trustees of the New Haven, who were to undertake to arrive at a solution of the problem of fixing limitations for the liabilities to be imposed on the New Haven by a merger of the Old Colony lines.

Immediately after the Court's appointment, the Committee engaged in extended conferences to explore possible areas of agreement. Basic factual data, necessary as a foundation for any such agreement, was assembled, and consultations were held by the Insurance Group's engineers, Professor William J. Cunningham and members of the Debtors' staff. After many weeks of concentrated effort, the Committee did reach agreement on all essential problems presented by merger of Old Colony with the exception of the price to be paid therefor. The Committee prepared and filed with the District Court on September 19, 1941 a document containing its agreement, known as the "Report of Compromise Committee".

This Report proposed that a limit be set on the amount the reorganized company should pay with respect to the interest on the bonds of the Boston Terminal Company, namely, interest at a rate no greater than a percentage of $275,000 equal to the percentage of the total use of the South Station by the reorganized company. More important, it proposed to insure the New Haven against any doubt as to the Commission's power to limit passenger losses upon the Old Colony lines through an amendment by that federal agency of the state-granted charters of New Haven and Old Colony by substituting a contractual obligation of the New Haven to operate passenger service in lieu of a charter obligation and by postponing the acquisition of the Boston Group for two years after consummation of the plan so that legislation might be enacted in Massachusetts to insure that, upon acquisition, New Haven would not be subjected to unlimited passenger losses. Lastly, the Committee had agreed that Old Colony passenger service could be discontinued if passenger losses on those lines exceeded $850,000 for any twelve-months' period during the first two years after the consummation of the plan and $250,000 for any twelve-months' period thereafter. The Commission had fixed as the test years 1941 to 1945 in determining whether Old Colony's earnings warranted retention in the system with the maintenance of passenger service. The Committee's proposal obviated the objection that if Old Colony's earnings by any chance met the test during these years, New Haven would be saddled with losses in future years no matter how extensive. It was, indeed, fortunate that this point was raised and a reasonable modification suggested because the swollen war earnings of all railroads, including Old Colony, would certainly have enabled Old Colony to meet the test in the critical years fixed by the Commission, while for the years following the war's termination, it has resumed its course of producing deficits only.

There is little doubt that the work of the Compromise Committee represented a very substantial contribution toward the reorganization of the New Haven. The formulas developed by the Committee provided safeguards for the public interest in both a sound reorganization of the New Haven and a continuation of reasonable passenger and essential freight service over the Old Colony lines and at the same time respected the interests of the New Haven creditors. The significance of the Compromise Committee Report in the history of the proceedings is indicated only in

part by the fact that it provided definite limits on the burden of Old Colony operations. It is also significant in that it represented a great concession and departure, in the public interest, from the position which the Insurance Group had theretofore maintained: that the New Haven must be separately reorganized. It showed, on the part of these predominantly New Haven interests, a willingness to accept sacrifices in the public interest of continuing the transportation services offered by the system. The fact that from the time of the Joint Report, which is discussed below, the Insurance Group became the leading supporter of the Plan which embodied the recommendations of the Compromise Committee, tends to obscure the fact that the provisions relating to the Old Colony acquisition represented a very substantial concession by the New Haven parties. These concessions were met by others made by the Old Colony parties, represented by Mr. Charles A. Coolidge for the Old Colony's Plan Committee and Mr. Myron F. Converse for the Mutual Savings Bank Group. When later new spokesmen for the East End interests entered the proceeding, an effort was made to have it appear that the Plan was developed by New Haven interests alone.

The success which marked the efforts of the Committee was fully appreciated by the District Court who, in his opinion of December 8, 1941, stated of the Committee's accomplishment that the report "accomplishes a forthwith and permanent assurance of continuance of freight service by a solvent railroad and without causing any abrupt dislocation of traveling habits provides for a continuation of passenger service during an interim period during which the parties may cooperate to bring the passenger losses into such dimensions that passenger service as well may eventually be permanently assumed by the reorganized New Haven without risk of undue loss."

However, this commendation of the Compromise Committee Report was contained in a decision of Judge Hincks of December 8, 1941 in which he disapproved the Commission's Plan. That disapproval was based primarily upon a belief that at the prices proposed by the Commission an involuntary merger of the properties of the Old Colony and Boston and Providence could not, in equity to other creditors, be forced on the New Haven. Likewise, he felt that the provision inserted by the Commission intended to insure the reorganized New Haven against wholly unprofitable Old Colony passenger operations was of doubtful validity and effectiveness. He also suggested that the record should be reopened to receive additional evidence with respect to certain matters, such as the anticipated value of the New Haven's securities after reorganization, the severance value of the New Haven to Old Colony, etc. Attaching a copy of the Committee's Report to his opinion, Judge Hincks returned the proceedings to the Commission, recommending the Report to that body for consideration.

With this ruling, the work of six years proved inconclusive, and in fact, the proceeding was then only at the half-way mark toward achieving an order directing consummation of a New Haven plan. Once more the scene of action shifted to the Interstate Commerce Commission.

CHAPTER XI.

THE 1942 HEARINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

After the decision of the District Court disapproving the plan, a joint petition was filed by the Insurance Group, the Mutual Savings Bank Group and the principal Debtor, requesting the Commission to reopen the proceedings in order that the record might be supplemented and brought down to date. An order granting the petition was entered by the Commission setting February 17, 1942 as the date for further hearings at the Hotel St. George, Brooklyn, N. Y. This order imposed no limitation on the scope of the evidence which might be adduced, although criticism was later unjustly directed at the Commission by Old Colony parties that the hearings had been too limited.

At the opening of the February hearing an agreed statement was made by Mr. John L. Hall on behalf of the three petitioners. In it these parties stated that they had prepared and would present evidence which they deemed necessary to complete the record before the Commission and, after referring to the expressions of the Court in its opinion, indicated their willingness to enter into discussions and negotiations looking to an agreement upon actual terms of merger and joint reorganization for the Old Colony. After this statement was made the evidence and testimony which had been prepared was introduced.

An important part of that evidence consisted of the testimony of Mr. Pierpont V. Davis, President of Harriman, Ripley & Co. Incorporated and a specialist in railroad securities. It was his task to predict the probable market values of the reorganized New Haven's securities. In his opinion the new fixed interest bonds would eventually sell for 90, the income bonds at 40, the preferred stock at 20, and the common stock at 10. As a matter of fact the common stock sold on a "when-issued" basis after consummation of the plan at 9, the preferred stock at 25, the income bonds at 37 and the first mortgage bonds about 70. Of course these securities have not yet had the appropriate seasoning on which Mr. Davis' testimony was founded. Other evidence was offered on the recent results of applying the segregation formula to Old Colony earnings, the severance value of Old Colony, the extent of the New Haven's prior lien claim, the value of the Boston Terminal and other factors relating to the fairness of the Terminal charges.

It was at this hearing that the Protective Committee for Holders of Old Colony Bonds put in its first appearance. This Committee had received authority from the Interstate Commerce Commission to solicit deposits on July 2, 1941, but had taken no active part in the proceeding. Originally,

the Committee represented only a few hundred thousand dollars of bonds, but its holdings increased as the proceeding progressed. This increase was probably due to the sale by the Mutual Savings Banks of their bonds and purchases by certain persons interested in the Committee. As its counsel, the Committee had retained Hon. Joseph B. Ely, long prominent in Massachusetts political circles and at one time Governor of the Commonwealth. Governor Ely appeared before the Commission at the 1942 hearings and asked several questions, as he put it, to ascertain the evidence the Committee might wish to offer. However, the Committee did not present any witnesses or documentary proof. Yet the disposition of the issues later raised by the Committee and its counsel was destined to cause over two years' delay in the consummation of the plan. Ironically enough the decisions and delay resulting from the litigation over Old Colony issues after the District Court approved a plan in 1944 ultimately resulted in no improved treatment from the Commission or the Court.

At the conclusion of the hearing Director Sweet ruled that the record would be kept open until April 4, 1942 for the submission of a further report by the Compromise Committee with respect to a reasonable price to be paid for Old Colony. In addition, the Director stated that all other parties would have opportunity to file suggestions on the Old Colony problem and briefs. The work of this Committee commenced immediately after the hearing closed and a proposed document, known as the Joint Report, was drafted. In addition to the members of the Compromise Committee, the Joint Report was signed by John L. Hall for the New Haven Plan Committee, James H. Brewster, Jr. and Harry C. Hagerty for the Insurance Group, Myron F. Converse for the Mutual Savings Bank Group and Charles A. Coolidge for the Old Colony Plan Committee.

This Report incorporated with but a few changes the provisions of the original report of the Compromise Committee. It also set forth factors to be taken into account in dealing with the Old Colony properties, including the Old Colony operating losses, the New Haven prior lien claim, the assets of Old Colony which would be subject to the prior lien claim, and the amount which the New Haven would be required to pay in cash to discharge claims against the Old Colony which that railroad had no funds to meet. It then made its proposal of terms for the acquisition of Old Colony. As the Report states "the Committee decided that representatives of the two Groups of security holders having conflicting views as to Old Colony and of the principal Debtor were better qualified to negotiate price than even the members of the Committee. Accordingly, negotiations were had between a representative of the Insurance Group, a representative of the Mutual Savings Bank Group owning a substantial portion of the Old Colony First Mortgage Bonds, and counsel for the principal Debtor. This Report embodies the results of those negotiations." The parties reached an agreement upon the allocation to Old Colony of $3,289,600 of new first and refunding mortgage bonds and $2,467,200 of new income bonds.

It had been hoped by the parties that upon conclusion of the Old Colony negotiation similar negotiations could be had with the Boston and Providence interests. However, shortly before the Old Colony negotiations were completed, the Boston and Providence petitioned the Commission to reopen the record to receive an amendment to the Commission's Plan providing for a greater price for the Boston and Providence properties and to receive evidence in support thereof. It seemed clear, therefore, that such negotiations would be inconclusive, but nevertheless the Compromise Committee deemed it desirable to have the Insurance Group, the Mutual Savings Bank Group, and the Debtor agree, if possible, upon fair terms for the acquisition of the Boston and Providence lines. Representatives of these parties did meet and discuss the problem. Their recommendation was also incorporated in the Joint Report, and provided that the Boston and Providence should be acquired for $2,314,113 of new first and refunding mortgage bonds and $1,735,585 of income bonds. This was conditioned on the imposition of limitations with respect to use of the Boston Terminal Company facilities similar to those proposed with respect to Old Colony.

Following the filing of the Joint Report on April 3, 1942, numerous briefs were prepared and filed with the Commission by the parties. Among the briefs filed was the joint brief on behalf of the Insurance Group, the Mutual Savings Bank Group, the Debtor and the Old Colony Railroad Company. Nine other parties, being in substantial agreement with this brief, joined therein, with their joinder qualified only in minor respects. Thus, for the first time the major parties in interest were in accord on these fundamental problems of the reorganization, and were ready to act in concert, an important step toward achieving an acceptable reorganization plan. Also included among the briefs was one filed by Governor Ely for the Old Colony Committee, setting forth its proposals with respect to fair treatment for the Old Colony. It is significant that this Committee did not petition the Commission to hold hearings on the recommendations contained in the Joint Report although subsequently it attacked the Commission's Plan on the ground among others, that the Committee had not been given an opportunity to be heard.

CHAPTER XII.

THE COMMISSION'S THIRD SUPPLEMENTAL REPORT.

After four months of consideration the Commission issued, on October 6, 1942, its Third Supplemental Report approving a plan of reorganization, the terms of which with respect to acquisition of the Old Colony and use of the Boston Terminal facilities were substantially like those set forth in the Joint Report. The Commission forthrightly so indicated and, in fact, annexed detailed portions of the Joint Report to its report and incorporated them by reference. This approach unfortunately was

to afford a basis for the unfounded charge that the Commission's Plan was not the result of an exercise by the Commission of its independent judgment but was solely the result of a compromise among certain parties. The Commission was eventually to be vindicated in its action in this regard.

The Commission's Plan adopted the recommendation of the Joint Report providing for the amendment of the charters of the Old Colony and of the reorganized New Haven so that neither road would be under any obligation to operate passenger service on Old Colony's lines. Rather, the reorganized principal debtor would undertake a contractual obligation to operate for its own account freight service on the Boston Group, and would also undertake a contractual obligation to operate passenger service on Old Colony lines if and so long as the losses therefrom should not exceed the critical figures of $850,000 a year during the two years following consummation of the Plan, or $500,000 for any two-year period thereafter (at the rate of $250,000 a year).

The Commission's Plan would also, as recommended by the Joint Report, abrogate the principal and secondary Debtors' statutory obligations in respect of use of the Boston Terminal Company's South Station by limiting the amount to be paid by the reorganized New Haven to that percentage of $275,000 annually which represents its use of such property.

The Commission incorporated in its Plan a provision, which had been urged by the Insurance Group's counsel in the past, permitting the Court to go forward with the reorganization of the principal Debtor, in case non-New Haven parties delayed, unnecessarily, the reorganization of the New Haven. The Plan concurred in the recommendations of the Joint Report that the Boston and Providence should be included in the reorganized New Haven (except that the Commission used as the amount of reorganization securities issuable that amount previously determined in its earlier Report), and as to the amendment of its charter obligations so as to conform to the same limitations with respect to the Boston Terminal. The Commission, lastly, expressly provided that reorganization of the New Haven should not be delayed pending acceptance and confirmation of a plan for the Boston and Providence.

During the 60 days following promulgation of the Commission's Third Supplemental Report of October 6, 1942, some seventeen sets of objections to the Report were filed. Objections to the finding of the Commission that the stockholder interests could not be recognized in the plan were filed by the Debtor, by those representing the Common and Preferred Stocks and by the Pennsylvania Railroad. All of these objections contested the total valuation of the New Haven's assets made by the Commission. Certain New Haven creditors also objected. The fully secured Bank Group and the Irving Trust Company objected to the recognition which their collaterally secured claims received, criticising the ratios used by the Commission for the appraisal of the bonds outstand-

ing as security for their claims. Two underlying bondholder interests, representing the Danbury & Norwalk Bonds and the Housatonic Bonds, objected to their treatment under the plan. The Independent Bondholders' Committee, representing First and Refunding Mortgage Bonds, made specific criticisms of the treatment of these securities.

From the point of view of the lessor railroads and their passenger service problems, there were objections by the Old Colony stockholders and bondholders to the terms of merger for the Old Colony Railroad properties embodied in the Third Supplemental Report. Similar objections were filed as to the price and terms of purchase for the Boston and Providence Railroad's properties. The representatives of the holders of Boston Terminal Bonds objected to the limitation on the payments which the reorganized New Haven might make for the privilege of the operation in the Terminal. They also attacked the legal premises upon which this limitation was based and sought a reopening of the record before the Commission in order to supply additional factual material regarding the value of the Terminal. The public authorities' objections, in great part, were as to the legality of the premises on which the limitation of loss provisions of the plan as to the Old Colony passenger service were based. These public authorities also asked additional opportunities to submit evidence.

After the filing of these objections and answers, the Commission reconsidered its Third Supplemental Report and on July 20, 1943 handed down its Fourth Supplemental Report, modifying the plan in minor respects. One of these modifications was to distribute the securities released through payments of interest and underlying debt. Another modification was to increase the allotment of first mortgage bonds to the holders of collaterally secured claims in recognition of a change in the ratio of their collateral to their claim. The final modification was to give limited effect to the request of the Massachusetts public authorities for an option to purchase the Boston-Braintree Branch of the Old Colony lines for a municipal transit district, should passenger operation by the New Haven be abandoned. The Fourth Supplemental Report adhered to all the other features of the plan embodied in the Third Supplemental Report and—most important—to the terms for joint reorganization and the provisions for limitation of loss in connection with the Old Colony passenger operations worked out by the Compromise Committee.

During the period while the Third Supplemental Report and objections were subject to consideration by the Commission, the Supreme Court had rendered its decisions in the reorganization proceedings for the *Western Pacific* and *Chicago, Milwaukee, St. Paul and Pacific Railroad* companies.* Until these decisions, the rôles of the Commission and the

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* *Ecker* v. *Western Pacific Railroad Company*, 318 U. S. 448 (1943); *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 318 U. S. 523 (1943).

courts were unsettled and the broad powers for the rehabilitation of railroads granted the Commission by Section 77 were not defined. These decisions lent support to the fundamental principles of the New Haven's plan—the exclusion of the old New Haven equity interests, the Commission's jurisdiction to set limitations on the amount of loss which might be incurred in the Old Colony operations, on the amount which might be paid for the privilege of operating the Boston Terminal and on the means by which that obligation might be modified. The opinions, furthermore, supported the Commission as the final arbiter on the questions of valuation and in the establishment of the overall permissible capitalization for the reorganized railroad. Where applicable, the rulings in these cases were to be held controlling in the New Haven case.

Thereafter, the Commission's Fourth Supplemental Report was certified to the District Court and the Court set August 20, 1943 as the date for the filing of objections to the Plan, and September 8, 1943, as the date for the hearing of argument in support of such objections. Some twenty-three objections by various parties were filed with the District Court. In view of the greatly increased earnings in all divisions of the New Haven and particularly the lessor railroads, the Old Colony and Boston and Providence, objections were filed on behalf of the Mutual Savings Bank Group and by the Old Colony Railroad Company, which had been parties to the Joint Report of April 3, 1943. These objections presented particularly vexatious problems. Not only had Old Colony shown no deficit in operations in 1942 but it had earned a sizeable profit and was apparently to do better in 1943. The Commission's plan had been based upon estimates of very limited earnings for Old Colony in these years and it thus appeared difficult to sustain as fair and equitable a plan grounded upon assumptions contradicted by events. The other objections to the Fourth Supplemental Report were in large part repetitions of the objections to the Third Supplemental Report.

On September 8, 1943, when the argument before the District Court in support of the various objections opened, the District Judge, recognizing the importance and advantage to be gained by agreement among the parties, called all parties into a "Pre-trial Conference" lasting throughout that day. He urged that the interests in the New Haven compose their differences in order to achieve a plan of reorganization in the shortest possible time. The Court also pointed out certain specific interpretations of the Plan which might be made and which might provide opportunities for compromise without modification of the basic Plan of the Commission. Such interpretations were offered particularly with respect to the objections of the Boston Terminal parties, the City of Boston and the Massachusetts authorities. The Court then adjourned the hearing on the plan to October 5, 1943 in order to afford the parties an opportunity to consider the possibilities of agreement. Unfortunately this conference was not productive.

On October 5, 1943 the Court began the hearings on the plan of reorganization embodied in the Commission's Fourth Supplemental Report, which hearings lasted through October 7, 1943. The following day Judge Hincks sent a memorandum to counsel for the Insurance Group, counsel for the Mutual Savings Bank Group, counsel for the principal Debtor and counsel for the Boston Terminal interests, offering a possible basis for compromise of the differences of these parties and suggesting a conference among such counsel. This proposal presented procedural difficulties as counsel for the Boston Terminal interests were unwilling to restrict the topics of the conference, as the Court had suggested, to such modifications as might be made within the framework of the Plan. A conference was, however, held on October 28, 1943, attended by counsel for the Trustee of the Boston Terminal Mortgage, the Institutional Group of Boston Terminal Bonds and the Insurance and Mutual Savings Bank Groups. At this conference the Boston Terminal parties expressed the view that the possibility of compromise would lie in a general revision of the provisions of the Plan dealing with the Boston Terminal problem and that no compromise within the framework of the Plan was within realistic possibility of achievement. No fruitful suggestions, therefore, were made. The conference thus came to an end and a report to this effect was made by the parties to the District Court.

CHAPTER XIII.

THE DISTRICT COURT'S ORDER OF APPROVAL AND ISSUANCE OF THE FIFTH SUPPLEMENTAL REPORT.

After the hearings in October of 1943 Judge Hincks, on December 21, 1943, handed down an opinion which approved the Commission's Plan in general but indicated certain respects wherein he felt the Commission had failed to comply with legal standards. Among other necessary corrections, he indicated, were improvement in the treatment of Old Colony by the amount by which actual Old Colony earnings exceeded the estimates for 1942 and 1943 without a corresponding increase in the total capitalization of the reorganized New Haven and an increased allotment of securities to the secured bank creditors, which corrections, if adopted and taken together, would require a substantial decrease in the new First and Refunding Bonds to be allocated to other secured creditors. Judge Hincks' opinion further stated that although he believed he had the power to correct the Plan as therein indicated through his decree, he would welcome a further supplemental report and order from the Commission. The problem presented by this opinion was the manner in which the Plan could be corrected without detriment to the treatment accorded New Haven secured creditors generally. The cash position of the Debtor was sufficient, as was indicated by Judge Hincks' opinion, to permit payment of the

secured bank loans upon a compromise basis. If such payment were effected and the securities allocable to the secured bank loans were reallocated among the other secured creditors, such other secured creditors would thereby receive substantially increased amounts of new lien obligations. In view of this fact, and since such a result would remove a basis for delaying litigation, the Insurance Group and other New Haven creditors advocated the payment of the secured bank loans upon a compromise basis. Numerous conferences were held with members of the Insurance Group and with counsel for the Debtor's Trustees, who carried on the negotiations with the banks, as to the proper basis for compromise. An agreement of compromise was finally arrived at despite the fact that initially counsel for one of the secured banks took the position that his bank had no power to make such a settlement. After the agreement had been reached a petition for payment upon the compromise basis was filed and a hearing held before Judge Hincks in New Haven on January 18, 1944. After such hearing Judge Hincks entered an order approving the proposed payment.

By this order the most serious problem presented by Judge Hincks' opinion was solved. It was recognized, however, that a supplemental report and order by the Commission would remove any question as to Judge Hincks' authority to make the indicated corrections and would also afford an opportunity for further modifications, such as increasing the capitalization to provide for the increased payment to the Old Colony and inclusion of other desirable provisions. However, the issuance of such a report did present novel and important questions as to the procedure required under the statute in connection with a further report. The Commission, nevertheless, was very receptive to the procedure suggested by Judge Hincks.

Under date of February 8, 1944, the Commission filed its Fifth Supplemental Report and Order giving effect to all of the corrections indicated by Judge Hincks and providing certain additional modifications, including an increase in capitalization equivalent to the increase in the purchase price for the Old Colony, as well as additional provisions with respect to the Old Colony and the Boston Terminal. In the meantime objections to the entry of a supplemental report and order had been filed with the Commission. The objectants urged that the Commission had no authority to take such action without a hearing and these objections were renewed before the District Court in the form of motions to strike from the record the Commission's Fifth Supplemental Report and Order. These motions were overruled by the District Court.

After certification by the Commission of its Fifth Supplemental Report and Order, Judge Hincks, on February 14, 1944, set hearings thereon for March 3, 1944, and directed the filing of any additional objections prior to such hearings. Several of the parties did file such additional objections and all of the objections filed prior to the October, 1943, hearings were

deemed to be renewed as objections to the Fifth Supplemental Report and Order except in so far as the corrections had eliminated such earlier objections. In addition, the motion to remand the proceeding to the Commission, filed by the Pennsylvania Railroad Company on February 2, 1944, was set down for hearing on March 3, 1944. Judge Hincks denied the motion, overruled all objections and on March 6, 1944 filed his opinion and entered an order approving *in toto* the plan embodied in the Commission's Fifth Supplemental Report and Order. So after over eight years of litigation, court approval was given to a plan of reorganization for the New Haven.

During March and April, 1944, notices of appeal to the Circuit Court of Appeals from this approval order were filed by fifteen different appellants. With the Summer recess and the time required to prepare a record and briefs, the months slipped by and the case was not argued until October 19, 1944. Then the argument consumed two more full days, making a lapse of over seven months between approval and argument of the appeals.

Prior to the argument, and during the pendency of the appeals, the Protective Committee for the Old Colony Bondholders, upon telegraphic notice to counsel, sought to enjoin submission of the plan of reorganization for a vote by security holders. A hearing on this motion was held in New Haven before Judge Clark of the Circuit Court of Appeals on September 25, 1944, and, since the granting of the motion would have entailed delays in the ultimate consummation of the plan of reorganization, counsel for the Insurance Group and others appeared in opposition thereto. A representative of the Interstate Commerce Commission and representatives of certain other parties also appeared in opposition to the motion. Judge Clark denied the motion and permitted the Commission to submit the plan to the creditors entitled to vote thereon for acceptance or rejection. Some question was raised as to the wisdom of this course of action since the expense of taking the vote was considerable and the pending appeals might render its results nugatory. As events proved the risk was well taken but if the Circuit Court had not eventually approved the plan the praise for taking this prompt vote might well have been blame.

Thereafter the Commission did submit the plan to the creditors entitled to vote thereon and in December 1944 certified to the District Court the results of that vote. All but two classes of creditors had given the required statutory approval of 66⅔%. Rejecting the plan were the Housatonic and Old Colony bondholders, the former falling short of the statutory requirement by less than 3% and the latter by just over 17%. However, the Housatonic bondholders never made an issue of their unfavorable vote and eventually accepted the plan's treatment of their securities without further murmur.

CHAPTER XIV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS AND ITS AFTERMATH.

On January 2, 1945, the Circuit Court of Appeals for the Second Circuit rendered an opinion on the appeals taken from the order of the District Court approving the plan of reorganization. That opinion approved the main features of the plan and affirmed the District Court's order in every respect but two: First, it determined that the claims of certain banks, the undersecured banks which had been restrained from disposing of their collateral until it had greatly declined in value, should be dealt with on the basis of the value of their collateral assuming a sale within a reasonable time after the New Haven's petition was filed; second, it directed a further review by the Commission of the terms of merger of Old Colony, on the ground that they did not appear to reflect the independent judgment of the Commission. The argument of compromise made by the Old Colony Committee had struck home. The Committee had very cleverly hammered away at the Commission's plan as solely the product of a compromise of a few parties. Because of the Supreme Court's statement in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, that conflicting claims to assets might "be more wisely settled by compromise" the Commission and the principal New Haven parties had thought that the Compromise Committee Report and Joint Report were highly desirable methods of dealing with the delicate problems they examined but the Circuit Court thought otherwise with respect to Old Colony despite representation in the negotiations of the Old Colony point of view by the Old Colony Plan Committee's counsel and The Mutual Savings Bank Group, at one time holder of almost half of the Old Colony bonds. Strangely enough, however, although the terms of the Commission's Plan with respect to the Boston Terminal were also identical with the recommendations of the two Compromise Committee reports, the Circuit Court did not find them invalid on the ground of compromise, apparently, first, on the ground that the Commission had made no mention of creditor approval being conditioned on acceptance by the Commission of those terms and, secondly, on the ground that the Plan's terms as to the Boston Terminal were not mandatorily binding on that company's bondholders.*

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* The Circuit Court's opinion on this point stated (147 F. (2d) p. 52):

"The appellants argue that the plan is subject to the objection discussed in the Old Colony appeal, namely, that the Commission merely adopted the suggestions of the Joint Report. There is nothing wrong with such an adoption, if the Commission on the basis of independent determination reached the conclusion that the suggestions of the Joint Report provide a fair and equitable plan. We are not persuaded that the Commission did not exercise its independent judgment as to the provisions relating to the Boston Terminal interests. With respect to these provisions there is no admission in the Commission's fourth supplemental

Thereafter, in a supplemental opinion dated January 23, 1945, the Circuit Court made certain minor modifications in its earlier opinion. Chief among these was the provision that, as requested by the New Haven Trustees, the claims of the undersecured banks for damages resulting from the order restraining them from disposing of their collateral should be dealt with as administrative claims and be paid in cash to the extent allowed. The appellate court also announced that, on the petition of the Commonwealth of Massachusetts, the remand of the Plan to the Commission for reconsideration of the Old Colony features, as required by its first decision, should include the reconsideration of the Plan's provisions dealing with possible reduction in passenger service on certain Old Colony lines.

A mandate incorporating the Circuit Court's decision was sent down to the District Court and Judge Hincks on February 13, 1945 entered an order returning the Plan of reorganization to the Commission, but only for the very limited purpose of considering the price to be paid for the Old Colony lines and the protective features of the Old Colony passenger service provisions. The Protective Committee for Old Colony, maintaining that the entire record as to Old Colony should be reopened in accordance with the intent of the Circuit Court's opinion and pursuant to the statutory requirements, immediately filed a notice of appeal from that order. The same Committee also filed a motion with the District Court requesting an expansion of the order of reference to include all phases of the Old Colony reorganization. Upon the District Court's denial of this motion an appeal was taken to the Circuit Court of Appeals from this order as well.

Not content with this action, Governor Ely petitioned the Commission to reopen the record and receive evidence on matters that had already received exhaustive treatment. Support was lent to his contention that the Commission was obliged under Section 77 to resume hearings by the Pennsylvania Railroad, which filed a similar petition with the Commission asking for a complete rehearing on the case. The Circuit Court of Appeals on June 30, 1945, sustained the position of the District Court in his limited remand of the Plan to the Commission as a correct interpretation of the appellate court's earlier opinion.* The higher court felt that the question of statutory construction as to the parties' right to require a reopening of the record for further hearings could not then be raised as the order of reference and the Circuit Court's opinion did not foreclose their rights

report that it refused to make modifications for fear that the necessary consent of creditors could not be secured, as was the case in regard to Old Colony. Moreover, the purchase price to be paid to Old Colony was mandatorily binding upon it, while here the Commission has merely fixed the allowable limits of an offer which Boston Terminal may reject. Hence the amount of the offer is a matter of business judgment to be considered from the standpoint of New Haven's interests rather than a statutory requirement that assets of a debtor to be reorganized in these proceedings be valued by the Commission."

* *In re N. Y., N. H. & H. R. R. Co.*, 150 F. (2d) 169.

on this score and the issue would not be presented until after the Commission had acted on the petitions for further hearings.

Meanwhile the Boston Terminal Company interests and the Commonwealth of Massachusetts were unwilling to accept the Circuit Court of Appeals' decision upholding the approval of the Plan with regard to them. Both the Trustee of the Boston Terminal Company's First Mortgage and the Institutional Group of Holders of Boston Terminal Bonds gave notice of their intention to seek review in the Supreme Court of the United States. Counsel for these parties, particularly Colonel Anderson representing the Institutional Group, were confident that both tribunals which had passed on their contentions had erred. They had, indeed, a plausible argument, also advanced by the Commonwealth, in their assertion that the Act creating the Boston Terminal Company and imposing an obligation to use and pay for the use of the South Station on the five railroads concerned was a valid exercise of police power by the Commonwealth and therefore was within the state's jurisdiction and not subject to interference by federal authorities. The Circuit Court had rejected this contention and found authority for the Commission's action in the Supreme Court's statement in the *"88 Stations"* case that governance over local activities of a carrier was withheld from both the Commission and the District Court "except as a part of a complete plan of reorganization."*

For the authority of the reorganized company to carry out those provisions of the Plan dealing with the Terminal Company the Circuit Court had pointed to the Act itself, §77(f) of which declares that upon consummation the reorganized debtor "shall have full power and authority to, and shall put into effect and carry out the Plan * * * the law of any state or the decision or order of any state authority to the contrary notwithstanding." Colonel Anderson and other counsel interested in the basic question whether or not states' rights were being invaded by this plan of reorganization in violation of the federal constitution felt that the Supreme Court should and would pass upon the issue. However, the petitions for certiorari to raise the point (in one of which petitions the Commonwealth and City of Boston joined) were delayed as long as the law permitted. The Terminal parties and the Commonwealth obtained an *ex parte* order from Mr. Justice Robert H. Jackson of the Supreme Court extending their time to file such petitions until May 29, 1945. Fortunately, because of the approaching end of the Court's term, these petitions were filed a week prior to this date.

These petitions put at issue four important questions as to the New Haven's Plan of reorganization:

First, the power of the Commission and the District Court to disregard the provisions of the Boston Terminal Company Act regulating the terms for the use of the Boston Terminal Company facilities and imposing a statutory obligation to use those facilities;

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* *Palmer* v. *Massachusetts*, 308 U. S., page 89.

Second, the authority of the Commission and the Court to amend the state-granted charters of New Haven and Old Colony to relieve them of their obligation to maintain passenger service on Old Colony lines;

Third, the validity of the procedure adopted by the District Court in connection with the issuance of the Fifth Supplemental Report; and

Fourth, the validity of the Commission's action in adopting the provisions of the Joint Report almost verbatim with respect to the terms for continuation of Old Colony's passenger service and the terms for the use of the South Station.

In the hope that the Supreme Court would act upon these applications before its Summer recess, the Insurance Group's counsel prepared a brief replying to both petitions, obtained the concurrence therein of many other interested parties and filed the same within less than three weeks after the petitions were received. The Supreme Court acted promptly and denied both petitions on June 12, 1945. A heartfelt sigh of relief for the most part greeted this action for it meant that the New Haven reorganization at last had crossed the hump and reached level grade, if not the down-grade. The Supreme Court's denial of certiorari for all practical purposes* removed any reasonable doubt as to the validity of the Plan on the issues raised by the petitions.

The petitioners, as was expected, applied to the Supreme Court for a rehearing on its action during the course of the Summer but when the Court reconvened for its Fall session a prompt denial of this application was issued.

CHAPTER XV.

CONFIRMATION OF THE PLAN OF REORGANIZATION.

Among other notable happenings in the reorganization proceeding, one event had transpired during the pendency of the Supreme Court proceedings which was of outstanding importance. This was the issuance by the Commission on May 14, 1945 of its Sixth Supplemental Report and Order, a Report issued without further public hearings or additions to the record. In this Report the Commission denied the Old Colony and Pennsylvania Railroad petitions to reopen the record, asserting that the record was already complete, and, of greatest significance, the Commission reaffirmed its previous findings as to the price to be paid for Old Colony's properties and the limitations which were to govern operation of passenger service over its lines. A more satisfactory ruling

* The Supreme Court has said many times that the denial of certiorari does not constitute an affirmance of the decision of the court below but for the purposes of the case in which such a denial occurs the result is practically the same as an affirmance, although in very rare instances the Supreme Court has, on petition for rehearing, reconsidered its denial of certiorari.

in the eyes of the New Haven parties could not have been obtained, although Governor Ely and his Committee were hardly in full agreement with the Commission and were perhaps somewhat surprised that the Commission had not treated Old Colony better in the light of the Circuit Court's ruling. True, the Circuit Court had stated that "it is possible, of course, that the Commission may still adhere to figures which are the same as those in the Joint Report. Such correspondence would not in itself invalidate the Commission's conclusions * * *.", so the Commission's action could not have been wholly unexpected even to the most optimistic Old Colony bondholder.

With the certification of this Report to the District Court it was appropriate for Judge Hincks to take up the matter of confirmation of the Plan. However, a disposition of this Sixth Report presented some very close questions—was it a Plan within the meaning of the statute? If so, it would have to be approved before it could be confirmed; it would have to be submitted again for a vote; it would be subject to the same appeals as the first approval order. Had the Commission violated the statute in failing to hold hearings? If so, the Sixth Report was invalidly issued and was without standing in the eyes of the law. The Commission had, perhaps, anticipated and sought to avoid a basis for raising the first of these questions for it had omitted to certify to the District Court a copy of the full Plan which had accompanied its Fifth Supplemental Report and merely certified a report and order which reaffirmed that plan. Judge Hincks dealt with these problems with great wisdom and skill. In his order of May 25, 1945 he fixed July 2, 1945 as the date upon which a hearing would be held upon the approval of the *report* and upon confirmation of the *plan,* thereby distinguishing the Commission's latest pronouncement from its Fifth Supplemental Report. Because of the pendency of their petitions for certiorari the Terminal parties and the Commonwealth asked Judge Hincks to revoke this order as premature and perhaps useless. Judge Hincks, however, scheduled the hearing on this motion for the same day as the confirmation hearing and, of course, by that time the Supreme Court had denied their petitions for certiorari and the Terminal parties' motion became a moot point.

Many were the objections filed to the Sixth Report, and to confirmation of the Plan as well, and on July 2, 1945 the federal courtroom in New Haven was substantially filled with distinguished counsel. Judge Hincks listened attentively and patiently to the opponents of the Sixth Report and the Plan, the statement of Governor Ely and his offer of proof, the plea of Mr. Drinker for the stockholders and others, as well as to the statements of the supporters of the Sixth Report and the plan. The fairness of the Plan and the need for expedition were urged on the Court by, among others, Mr. Sunderland for the Insurance Group, Major Fred N. Oliver for the Mutual Savings Bank Group and Mr. Coolidge for the Old Colony Railroad, while Governor Ely and the Terminal parties asserted that any expedition would only be at the expense of their rights,

particularly since the Old Colony bondholders had rejected the Plan when submitted to them for a vote. In addition, the Terminal parties strenuously objected that when, as and if they rejected the Plan's terms they would then become creditors and entitled to vote and, therefore, would be deprived of their vote unless the whole proceeding were delayed until some indefinite future date when the extent of their claim against New Haven could be liquidated. When all had spoken who desired to be heard, Judge Hincks reserved decision and after full consideration of the serious problems presented, on August 31, 1945 he issued his memorandum of decision on the Sixth Supplemental Report and on confirmation of the approved Plan.

In his opinion Judge Hincks overruled all objections to the Sixth Supplemental Report. He found that this Report was the product of the Commission's independent judgment in appraising the value of the Old Colony properties and the price to be paid therefor and that legal standards had been observed in this exercise of judgment. On the issues presented by confirmation of the Plan, Judge Hincks met the formidable statutory requirement that he find that the Plan was fair and equitable and not reasonably rejected by the Old Colony bondholders and did so find. In addition, he overruled the Terminal parties' arguments as to their voting rights and stated that he would confirm the Plan. This he did by order of September 6, 1945. The order avoided the problem of dealing with the Sixth Supplemental Report as a new plan of the Commission and the consequences of such treatment. It merely stated that the Report should be admitted to the record and then went on to reinstate, *nunc pro tunc*, the earlier order of approval and to confirm the Plan. The bases for objection inherent in this order were easily foreseen and such objections were soon forthcoming. One might have suspected that the end of the New Haven proceeding was in the not too distant future, but the complicated nature of a railroad reorganization and the litigation it permitted under its then untried procedures decreed otherwise. Five appeals were taken from the confirmation order, the most significant being those of the Old Colony Committee and the Boston Terminal parties. With the delays permitted by law and those caused by the intricacies of the case the final briefs on these appeals were not filed until the middle of January, 1946, and the case not argued before the Circuit Court of Appeals until April of that year. Then, after four months of anxious and hopeful waiting the expectations of all parties were dashed when on July 30, 1946 the Circuit Court handed down an order specifying sixteen questions it wished to have reargued at the Fall term, eight questions relating to Old Colony and eight to Terminal problems.

At that time the fate of the New Haven case did not rest solely in the hands of the judges of the Circuit Court of Appeals. Forces outside of the proceeding were developing which would have frustrated the New Haven and other pending railroad reorganizations. Senator Reed of Kansas, after

giving consideration to the importuning letters of railroad stockholders and creditors who were being excluded from any participation in various plans, had introduced a bill in the Senate which was to provide an allegedly simpler procedure for alleviating financially embarrassed railroads and was specifically applicable to railroads already in Section 77 proceedings. If the bill became law it would have put to an end the years of work in the New Haven and other cases and substituted entirely new proceedings which undoubtedly would have been just as protracted as the proceedings then pending. Tension among the New Haven parties was high in July of 1946 as the Congress acted upon the measure. When it was passed in both the Senate and the House of Representatives all appeared lost. However, after weighing the merits of the bill for the full ten-day period allowed him by law President Truman did the then unexpected and exercised his power of pocket veto, effective on August 13, 1946. The eleven years of effort in the New Haven case, as well as in other cases, was preserved and the proceeding could go forward, subject to the Circuit Court's action. Whether this pending legislation had any bearing upon the Court's request of July 30, 1946 for a reargument of the case is not apparent. Had the bill become law, reargument before the Circuit Court would have been unnecessary.

Once again briefs and reply briefs were prepared for the Circuit Court of Appeals and on November 18 and 19, 1946 argument was again heard by that Court. Governor Ely reiterated that the Sixth Supplemental Report was no more the product of the Commission's independent judgment than were the Third, Fourth and Fifth Supplemental Reports. It was his position that the Commission's latest Report was merely an obvious camouflage consisting of an attempt to construct a justification for a result which was not its own but was the outcome of a meeting of certain of the New Haven parties. The inherently difficult nature of the task of valuing a railroad property and then describing the process by which the final figures are reached, which was the Commission's task with respect to Old Colony, offered him a fertile field for attack and the Governor, through a piece-by-piece dissection of the Commission's Sixth Report, presented an ingenious case. But he overlooked the basic fact which the Supreme Court had recognized, that to attempt to require a rule of scientific exactitude in any such appraisal would be to "create an illusion of certainty where none exists."* As that Court realized, in final analysis, the ultimate conclusion in such a valuation proceeding could only be an informed guess founded upon years of experience and consideration of the variables involved in any such appraisal. The majority of the Circuit Court had full comprehension of the difficulties confronting the Commission in such a valuation and therefore rejected Governor Ely's method of attack on the Commission's conclusion.

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* *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S., page 365.

Naturally, Governor Ely did not let the procedural points arising from the failure to submit the Sixth Report for a vote and the failure to hold further approval hearings go unnoticed. These, too, were novel questions without precedent in any other reorganization proceeding. However, his argument that the plan once more should have been sent to Old Colony bondholders for acceptance or rejection lost most of its force because the vote of his interests had originally been unfavorable. As the Circuit Court was to recognize, the most that could happen on a further vote would be an increase in the percentage of rejecting votes. Had the Old Colony vote been originally favorable, his position would have been strengthened by the fact that following the reversal by the Circuit Court, a restatement by the Commission of the same result might again be suspect and induce accepting bondholders to reverse their vote. Whether or not the Governor's theoretical argument had merit, the foregoing factual situation being absent, it would have been folly to have applied his theory to the case and the Circuit Court did refuse to require another vote.

The Terminal parties argued a multitude of questions but in essence raised only one pertinent issue, apart from a matter of construction of the Plan with which the appellees agreed, and that was their right to vote on the Plan. The Commission had provided in its plan for an offer to the Terminal Company's bankruptcy trustee of terms for the use of the Terminal facilities by the New Haven which offer the trustee could accept or reject. Until the offer was rejected the Terminal Company and its bondholders, although contingent creditors of the New Haven, had no ascertainable claims against the New Haven when the vote was taken in the Fall of 1944, the offer not having yet been extended. Therefore the Terminal bondholders were not in a position to vote. In brief, their claim before the Circuit Court was only that the vote should have been delayed until the offer was made; but their position had no substance to it for they also had the right to vote on the New Haven offer in their own reorganization proceedings and thus were not deprived of an opportunity to demonstrate by an adverse vote any inherent unfairness in the terms of the New Haven's offer. Furthermore, it is clear that had the offer been made immediately following approval of the Plan, these bondholders could have contended, and possibly correctly so, that the offer was premature because the approval of the Plan's provisions in this respect was being appealed. They, no doubt, would have delayed all progress in the New Haven proceeding until their own minor issues were resolved. When it is borne in mind that the New Haven proceeding involved the rights of creditors and security-holders having over $300,000,000 in claims and that the Terminal parties were fighting only about an annual payment of $275,000, the incongruity of delaying the vote on the Plan until the Terminal parties' doubtful and highly technical statutory arguments could be resolved will be readily appreciated. The Circuit Court of Appeals was sufficiently aware of these facts when it overruled all arguments of Colonel

Anderson and his allies and held that no injustice had been done the Terminal bondholders.

The Circuit Court of Appeals on January 13, 1947 rendered its decision affirming *in toto* the District Court's order confirming the Plan. On that day the Court handed down three separate opinions, two of which favored affirmance and one of which dissented. The favorable opinions sustained all findings by Judge Hincks as to the fairness and equity of the Plan with respect to Old Colony and the absence of collusion between the Commission and the parties in fixing the terms for acquisition of Old Colony's properties and dismissed the Terminal bondholders' contentions as to their voting rights. Judge Jerome Frank dissented from his colleagues with respect to Old Colony and in a rather strained opinion, Judge Frank accepted in full the position of Governor Ely that the Commission had not exercised its independent judgment with respect to Old Colony.* Judge Frank's reasoning did not sway his fellow members of the bench nor was it to impress the Supreme Court on Old Colony's petition for certiorari.

This was the first time that the Old Colony aspects of the Plan were in a position to be presented to the Supreme Court of the United States. For this reason Governor Ely's Committee delayed filing its petition until April 1947 when its time to file, which had been extended by a Justice of the Court, had almost expired in order to insure a complete presentation of the alleged errors in the Commission's Plan. For this same reason it was of the utmost importance to those opposing the petition that the

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* In his opinion, Judge Frank made the following statements (161 F. (2d) 413, 449, *et seq.*):

> "On the previous appeal, we told this Commission that it had violated the statute by surrendering its judgment to others. Reversed, it comes back to us with a report manifesting no real regard for our criticism. The Commission's position now is that we must be satisfied if only it recites a formal abracadabra to which it has added a few words as a sop to us.* * *.
>
> "If, however, the Commission is sustained in this case, and, accordingly behaves similarly in future cases, then its conduct will indeed be a mystery. Its so-called 'valuations' will then be acceptable, no matter how contrived. In that event it would be desirable to abandon the word 'valuation'—since that word misleadingly connotes some moderately rational judgment—and to substitute some neutral term, devoid of misleading associations, such as 'aluation,' or, perhaps better still, 'woosh-woosh.' The pertinent doctrine would then be this: 'When the I. C. C. has ceremonially woosh-wooshed, judicial scrutiny is barred.' It would then be desirable to dispense, too, with the Commission's present ritualistic formula, 'Taking into consideration, etc.,' replacing it with patently meaningless words—perhaps the same words spelled backward, (i.e., 'Gnikat otni noitaredisnoc, etc.')** Then no one would be foolish enough to believe that the figures in a Commission plan necessarily have anything to do with deliberation, but everyone would know that the figures might well have been the product of omphalic inspiration, or ornithomancy, or haruspication, or aleatory devices, and that the conclusions of the I. C. C. might well be but the conjurations of mystagogues.
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> ** Had that been the rule, the Commission's Sixth Report would have concluded thus: 'Nopu rehtruf noitaredisnoc dna gnikat otni noitaredisnoc eht roirp-neil mialc etc.'
>
> As to the expedient of thus spelling words backwards to avoid misleading the reader, see George, *The Scientist in Action* (1938) 109."

Judge Frank was careful to note that his "reaction must not be taken as an expression of any general hostility to * * * the I. C. C."

adequacy of the Commission's consideration of the Old Colony problems and its fairness in dealing with them be exposed. Despite the magnitude of the task the New Haven parties managed to prepare and file their brief in time for the Supreme Court to act prior to its Summer recess. The Court's action was a denial of the Old Colony petition on June 23, 1947. At the same time it also denied another petition for a writ filed by Colonel Anderson on behalf of the Institutional Group of Boston Terminal Bondholders. And so, at long last, the principal New Haven litigation was at an end.

It was inevitable that the Old Colony Committee would petition the Supreme Court for a re-hearing but none but the most timid of souls would have permitted this prospect to restrain progress in the proceeding in the absence of a stay by the Supreme Court and the Reorganization Committee was not so constituted. That Committee was to advance the proceeding to its conclusion at full speed and, as they correctly anticipated, the Supreme Court on October 20, 1947 did refuse to grant the petition for re-hearing.

CHAPTER XVI.

CONSUMMATION OF THE PLAN OF REORGANIZATION.

Judge Hincks had not awaited the Supreme Court ruling before taking some steps towards consummating the New Haven's Plan. Immediately following the Circuit Court of Appeals' affirmance of his confirmation order, he requested the parties entitled under the Plan to do so to file their designations of members of the Reorganization Committee. The Plan provided that the Insurance Group, the Mutual Savings Bank Group and the Company itself, were entitled to select one member each of the Committee and that the Court should appoint one member to represent the unsecured creditors and one member to represent the secured creditors. The Insurance Group designated James H. Brewster, Jr., Vice President and Treasurer of the Aetna Life Insurance Company and Chairman of the Insurance Group and of its Executive Committee as its representative; the Mutual Savings Bank Group named Myron F. Converse, President of the Worcester Five Cents Savings Bank and Chairman of its Group; and the Company designated John L. Hall, Esq., senior partner of the Boston law firm of Messrs. Choate, Hall and Stewart, who had been counsel for the principal Debtor throughout the proceeding. Judge Hincks appointed Mr. Allerton F. Brooks, President of the Southern New England Telephone Company, to represent the secured creditors' interests and Professor Kent T. Healy, Professor of Transportation at Yale University, to represent the unsecured creditors. This representative group of men was confirmed by Judge Hincks as the New Haven's Reorganization Committee, empowered to take all steps necessary to consummate the plan, in an order entered January 29, 1947. For their counsel the Committee selected Davis

Polk Wardwell Sunderland & Kiendl of New York City who had been counsel to the Insurance Group throughout the proceeding.

From its organization, the Committee was fully aware that there were certain important preliminary determinations to be made by it under the provisions of the Plan and that these could be made regardless of the outcome of the Supreme Court litigation. The plan left to the Committee the decisions whether to use the existing charter of the New Haven or to form a new corporation, whether to change the effective date of the Plan from July 1, 1943 to some subsequent date and whether to use the old First and Refunding Mortgage or to create a new mortgage. In order to make a determination on any of these problems the full and expert cooperation of the Bankruptcy Trustees, their counsel (now Vice President and General Counsel), Hermon J. Wells, Esq., the Company's Vice President and Comptroller, Mr. George T. Carmichael, (now Vice President and Executive Assistant) and their staff was given to the Committee. The accounting department furnished all the necessary financial data with respect to the Company's anticipated earnings and cash position and the legal staff headed by Mr. Wells presented all the views of the Company on the problems confronting the Committee.

After weighing all factors and after consulting with the Committee's counsel, the Committee made its decisions. It first resolved that the existing New Haven corporation should be used with its charter amended. It was believed that goodwill would be preserved in this way and that tax and other advantages would accrue. On the other hand, the Committee determined that the best interests of the Company would be served by the creation of a new first and refunding mortgage in order that the Company might have a modern instrument under which to work. Many changes had been made in the forms of corporate mortgages and in corporate trust practice since the old First and Refunding Mortgage was created and the Committee deemed it beneficial to the Company and the security holders to have the advantages which a new mortgage would ensure. Lastly, primarily for practical reasons, the Committee concluded that the effective date of the Plan should be advanced to July 1, 1947. The Commission's Plan provided that the Committee could only change the effective date if no increase in the amount of the creditors' claims resulted from such a change. This decision, therefore, entailed a comparison of the funds which would have been required to pay interest on the new securities from the old effective date in 1943 to the probable time of their issuance in 1947 and the funds which would be required to reduce the claims, increased by accrued interest, to the same amounts as existed at the old date. In addition, the Committee knew that interest on underlying issues had been paid currently and that if the date were not changed, in some instances it would be necessary to recapture funds from bondholders holding underlying issues having higher interest rates than those of their new securities. There was also the very important consideration of the desirability of

issuing new securities dated as closely as possible to the time of their issuance in order to avoid confusion among the thousands of creditors who would receive them. The problems which were avoided by changing the effective date were deemed by the Committee sufficient to fully justify its decision.

Once made, the effectuation of the Committee's decisions was by no means an easy matter. For instance, the obstacles in the path of amending the Debtors' charter were formidable. The New Haven had been incorporated under the laws of Massachusetts, Connecticut and Rhode Island, yet in none of these States was there legislation which would permit the charter amendments required by the Plan. On the contrary, their statutes indicated prohibition of the required amendments. Other States, such as Maine, Delaware, Wisconsin, New York, Missouri and Minnesota had passed enabling legislation to assist railroads being reorganized under Section 77 to accomplish the aims of their plans, but this was not true in the States in which the New Haven was incorporated. Two courses, therefore, were open to the Committee—to rely upon the amendment of the New Haven's charter by operation of the plan itself as an exercise of superior federal power, or to seek statutory assistance from the Connecticut Legislature. Although counsel advised the Committee favorably as to the legality of the former procedure,* to avoid any doubts and to forestall any litigation which might arise as to the validity of the reorganized company's new securities, it was concluded that the latter course should be adopted. Legislation was drafted, submitted by Counsel for the Trustees to the Connecticut Legislature, and final approval obtained by June 18, 1947. Since the Connecticut Legislature was not to convene again until 1949, the situation called for prompt and successful execution by the Committee of its decision and such expedition was fully achieved.

Again, with respect to the change in the date for the computation of claims the Committee's task was not easy. One of the difficult problems presented was how to deal with the Old Colony bondholders. Under the Plan their properties were to be acquired as of January 1, 1944, for securities dated as of July 1, 1943. If this latter date were advanced to July 1, 1947, without compensation to the Old Colony bondholders, there would be a manifest unfairness, for they would be then deprived of all the interest which they would otherwise have received in the intervening years. To rectify this obvious injustice the Committee proposed a cash payment equal to the interest which would have been paid Old Colony bondholders on their New Haven securities if they had been issued January 1, 1944. This proposal inspired no objection by the Old Colony bondholders, but it was to constitute the basis for a subsequent claim by the Boston and Providence bankruputcy Trustee that this Company's security holders should receive identical treatment.

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* The Supreme Court substantially supported this view in a decision rendered one year later, *Seaboard Air Line Railroad Co.* v. *Daniel*, 333 U. S. 118 (Feb. 8, 1948).

The Committee also had to demonstrate to the Trustees and the Court the desirability of their proposal. In this they were fully successful and on August 4, 1947, Judge Hincks approved the Committee's recommendations in which the Trustees joined. An unsecured creditor, Miss Jean Annett, maintained that the change in effective date was detrimental to the interests of the unsecured creditors and filed a notice of appeal from the Court's order of that date, but has failed, to this writing, to carry the appeal to a conclusion.

Aside from these basic matters, the work of the Committee and its Counsel consisted of the preparation of the hundred and one documents needed to carry out the terms of the plan, the selection of fiduciaries, the designation of Guaranty Trust Company of New York as Exchange Agent, the obtaining of the Commission's approval of the Committee's expenses and the issuance of new securities and transfer of properties, the "when issued" and final listing of the new securities on the Boston and New York Stock Exchanges and the designation of a new Board of Directors to serve after the properties of the New Haven were returned to its managing officers.* The vast majority of this work was compressed into a span of less than three months, from the date of the Supreme Court's decision with respect to Old Colony, June 23, 1947, to the date fixed for a consummation hearing, September 11, 1947. It was also done under the pressure of the knowledge that there was pending in Congress a revived bill introduced by Senator Reed of Kansas which, if passed and signed, would have nullified the twelve years of effort which had gone into the New Haven reorganization. The Committee was obliged to assume the heavy responsibility of proceeding with the consummation of the Plan despite the threat of this legislation and the remote possibility of favorable action on the Old Colony's petition in the Supreme Court for a rehearing. However,

* The work of the Committee was briefly described in an order of the Interstate Commerce Commission dated May 5, 1948 as follows:

> "* * * the committee's task required it and its counsel to make certain necessary preliminary determinations under the plan, the most important of which were its decision to use the existing principal debtor corporation with its Connecticut charter appropriately amended as the corporate vehicle for carrying out the plan, to change the date for the computation and capitalization of claims from July 1, 1943, to July 1, 1947, and to create a new first and refunding mortgage; to obtain the satisfaction and release of 11 existing mortgages and the assumption by the reorganized company of obligations under 2 mortgages, guaranties of 3 mortgages, 10 equipment trusts, 6 conditional-sale agreements and 3 leases; to prepare the instruments governing the 4 new classes of securities aggregating over $375,000,000 in principal amount, as well as the securities themselves, and effect their valid issuance; to obtain all requisite authority from the Commission and the court for the issuance of the new securities; to select the fiduciaries and agents to issue the new securities in exchange for the old; to bring about the entry of an effective order of the court transferring the properties and assets of the several debtors to the reorganized company, discharging the debtors and their trustees and providing generally for the consummation of the plan; to obtain the effective execution of all documents required to carry out the plan; to issue the necessary instructions for, and supervise, the exchange of old securities for new securities pursuant to the plan; and to obtain the listing of the new securities on certain securities exchanges and their registration under the Securities Exchange Act of 1934."

in the closing days of the session the House Rules Committee refused to bring legislation as controversial as this to the floor for a vote, thereby insuring its demise as far as the New Haven case was concerned, and the Supreme Court denied the petition for rehearing.

Despite these pressures and responsibilities the Committee did bring on the consummation hearing and a proposed order detailing steps necessary to conclude the proceedings. When Judge Hincks approved the Committee's order, as requested, on September 11, 1947, the New Haven reorganization proceeding was for all practical purposes terminated. There, of course, followed in succession the amendment of the Company's charter, the first meeting of the Board of Directors of the reorganized Company,† the approval by the Commission of the issuance of new securities and transfer of properties, the first meeting of the Reorganization Committee as sole New Haven stockholders and the commencement of the exchange of old securities for the new securities with the exception of the new Common Stock.

Under the terms of the Plan the Common Stock is to be issued to the unsecured creditors whose claims have been ascertained after reserving an amount sufficient to provide an equal proportionate distribution for holders of claims not then liquidated. However, at the time the Consummation Order was entered the contingent nature of the important unliquidated unsecured claims—that of the Boston Terminal bondholders for a deficiency in the event of a foreclosure of the South Station, that of the Boston and Providence Railroad for breach of lease and that of the "Secured Sixes" in the event their issue is not paid off either by the Company or by their collateral—rendered it a practical impossibility for Judge Hincks then to estimate the Common Stock to be reserved to meet these claims. After consideration of the problems involved in distributing the Common Stock the reorganized Company, on November 13, 1947, filed a petition requesting the District Court to adjudicate the amount of liquidated claims entitled to participate in the Common Stock, authorize a distribution to those claimants and reserve sufficient Stock to afford equal treatment to the holders of the unliquidated claims. At the hearing on this petition held December 1,

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† Among the responsibilities imposed upon the Reorganization Committee by the Plan of Reorganization was the selection of the members of the Board of Directors to serve until the first annual meeting. Following the tradition of the original charter of the New Haven, the by-laws provided that a majority of the members of the Board should be residents of one or more states in New England. Responsive to this requirement and in an effort to provide a Board composed of persons thoroughly familiar with the New Haven's affairs, the Reorganization Committee unanimously designated as members of the Board of Directors, the following: Charles Francis Adams, Morgan B. Brainard, Allerton F. Brooks,* Edward G. Buckland, Myron F. Converse, John L. Hall, John A. Hartford, Harry C. Hagerty,** Kent T. Healy,* James Lee Loomis, John J. McKeon, Fred N. Oliver,** Howard S. Palmer, Edward H. Rathbun, James L. Richards, and Edwin S. S. Sunderland.**

* Appointed members of the Reorganization Committee by the District Court as representatives, respectively of the secured and unsecured creditors.

** Appointment confirmed by Interstate Commerce Commission.

1947, all unsecured creditors except one opposed any distribution of the Common Stock at that time or any attempt to reserve Stock for the contingent claimants. Judge Hincks accepted this view that it was unwise to attempt a distribution at that time and therefore on December 11, 1947 entered an order which fixed the unsecured claims then liquidated entitled to share in the Common Stock at $46,916,727.01.

Both the Company and the Reorganization Committee were anxious to achieve the issuance of the Common Stock to those creditors who alone of the New Haven's creditors had not received their reorganization securities. To this end on February 25, 1948, the Company again petitioned the Court to reserve sufficient Stock to cover unliquidated claims and to direct an initial distribution of Common Stock to the holders of the claims already allowed. Again a hearing was held and on this occasion, March 24, 1948, all parties appearing were in agreement with the Court that it might safely authorize a distribution of one share of Common Stock for each $100 of allowed claim, although the Company advocated an initial distribution of two shares for a similar amount of claim. Judge Hincks agreed with the creditor parties and on April 5, 1948, entered an order approving a distribution of $46,916,727.01 of the Common Stock and a reservation of the remainder of the issue for the holders of the unascertained claims.

By that time the exchange of securities through Guaranty Trust Company of New York as Exchange Agent, pursuant to the Consummation Order, was 93% completed, a remarkable achievement by the Reorganization Committee in obtaining the surrender of old securities within a minimum of time.* The Committee, upon entry of the Court's order, immediately undertook the necessary steps to insure the prompt issuance of the Common Stock, for it was realized that the holding of the first meeting of stockholders of the reorganized Company was dependent entirely upon the distribution of a substantial amount of this Stock to its

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* Since in all reorganizations or receiverships three or four percent of the old securities are never exchanged, the New Haven's principal exchange was thus wellnigh completed by the time the distribution of Common Stock was directed.

The Commission noted this expedition in its report of May 5, 1948 in the New Haven proceeding where it stated:

> "Although the committee's application was not filed with the Commission until July 31, 1947 (prior filing being impracticable since Congress, in which there was pending proposed legislation which would have had the effect of suspending the reorganization proceedings, did not adjourn until the latter part of that month), the exchange of securities actually began on October 1, 1947, and by November 15, 1947, the exchange was three quarters complete. Such prompt disposition could not have been effected had counsel not been thoroughly equipped to undertake this work, and intimately familiar with the existing capital structures of the several debtors and of the plan, by reason of their experience since 1935 in the reorganization proceedings as counsel for the insurance group. In this connection, it should be noted that it has often been deemed desirable to retain two legal firms, with the attendant cost, as counsel in consummating a reorganization as complex as the instant one."

In no small part this expedition was due to the expert handling of the exchange by Guaranty Trust Company of New York which utilized its long experience in these matters to best advantage.

owners. Arrangements were made to carry out the exchange and the District Court, on May 19, 1948, approved the procedure which the Committee and its counsel had devised for this purpose. After due notice the surrender of unsecured claims for Common Stock and certificates to represent each claimant's right to any subsequent distribution of Common Stock commenced May 26, 1948. As soon as the evidence is before it that a substantial amount of the Stock has been issued, the Reorganization Committee in compliance with the terms of the Certificate of Amendments to the Charter and Acts of Incorporation of the Company and the Company's by-laws, will take the necessary steps to call a first meeting of stockholders.

The record of accomplishment of the Reorganization Committee in completing the difficult task which they assumed is outstanding. Faced with the very formidable undertaking of putting the New Haven's reorganization plan into effect, an undertaking made more burdensome by time limitations and by outside pressures, it must be recognized that they performed their duties with unusual expertness and expedition. Under their competent guidance the multitude of necessary documents were prepared, the far reaching decisions required by the Plan and the circumstances were made and the Court and Commission proceedings instituted and carried through to successful conclusions within a minimum of time and with a maximum of efficiency. To these men who gave so unselfishly of their time in the interests of the public welfare there exists a debt of gratitude which it would be difficult to repay.

The work of the Reorganization Committee and the problem of reorganizing the New Haven as such was thus satisfactorily concluded. The limited questions not yet answered in no way affect this record of accomplishment with respect to the principal objective. Following the determination by the Commission, that the public interest demanded effective solutions of the East End problems of the Boston and Providence and the Boston Terminal, every effort was made by the Commission, the Court and the New Haven creditors to bring about their completion. Unfortunately, the offers which the Commission and the Court thought fair for the Boston and Providence and Boston Terminal have not been accepted. On the contrary, the Boston Terminal's bankruptcy trustee on August 21, 1947 rejected the offer of the Plan and the Boston and Providence provisions of the Plan were disapproved by the District Court of Massachusetts on February 26, 1948. In addition, some disposition must be made of the New Haven's liability to the Terminal Company bondholders whose present plan of reorganization of that Company contemplates a foreclosure sale of its property to establish their deficiency claim against the New Haven. On April 22, 1948 an Interstate Commerce Commission Examiner issued a proposed report recommending that the bondholders be permitted to foreclose the mortgage and sell the property for not less than $9,000,000. Exceptions to this report have been filed by various parties, including the railroads using the South Station. The Boston and Pro-

vidence Trustee has appealed from the Consummation Order of September 11, 1947, maintaining that Judge Hincks had no authority to direct the New Haven to operate Boston and Providence's properties for that railroad's account once the Consummation Order was entered. The Circuit Court of Appeals has heard argument on this appeal but has yet to render a decision. The same Trustee has likewise recently filed alternate applications with the Interstate Commerce Commission, requesting either a revision of the segregation formula under which the New Haven operates its properties or permission to abandon the road if the formula is not revised, on the theory that the deficits arising from operation under the formula will consume the property. The question of continued passenger service on Old Colony lines has come to the fore with the New Haven's original notice of its intention to terminate all such service on October 1, 1948 on the ground the critical figures as to losses incurred by such service provided for in the Plan have been exceeded, although this time has been extended to March 1, 1949 by the New Haven's directors to provide the Massachusetts authorities with additional time to work out a solution of the passenger service problem. The partial issuance of the Common Stock sharply focuses attention on the first meeting of stockholders. Such, then, are the scattered questions arising out of the New Haven reorganization yet to be answered. However, it cannot be gainsaid that the primary task of reorganizing the New Haven proper has been completed. Of necessity, certain ancillary problems which are a part of or a consequence of the New Haven's reorganization must await further action in the Courts but the history of the New Haven's Section 77 proceeding as such has come to its conclusion, and a thoroughly successful conclusion, since the major objectives of the parties, the Commission, the Trustees and the Court have been attained.

APPENDIX A.

SCHEDULE OF COURTS, BANKRUPTCY TRUSTEES, REORGANIZATION COMMITTEE MEMBERS AND CERTAIN PARTIES INTERVENING BEFORE THE DISTRICT COURT AND THEIR COUNSEL.

Courts.

United States District Court for the District of Connecticut (New Haven and Old Colony Proceedings)	Hon. Carroll C. Hincks
United States District Court for the District of Massachusetts (Boston & Providence RR. Co. and Boston Terminal Co. Proceedings)	Hon. Francis W. Ford

Bankruptcy Trustees.

New York, New Haven and Hartford RR. Co. Hartford & Connecticut Western RR. Co. Old Colony RR. Co.	Howard S. Palmer, President, The New York, New Haven and Hartford Railroad Company; James Lee Loomis, President, New England Mutual Life Insurance Company; Winthrop M. Daniels, Professor of Transportation, Yale University; Henry B. Sawyer, formerly of Stone and Webster;

Counsel.

William W. Meyer
Hermon J. Wells

Boston & Providence RR. Co.	Bentley W. Warren, Attorney; Charles F. Mulcahy, Attorney

Counsel.

Paul E. Troy
John Noble, Jr.

Boston Terminal Co.	S. Lewis Barbour George F. Mahoney, Attorney

Counsel.
James N. Clark

New Haven Reorganization Committee.

John L. Hall, *Chairman*	Member, Choate, Hall and Stewart, Boston, Mass.
James H. Brewster, Jr.	Vice President and Treasurer, Aetna Life Insurance Co., Hartford, Conn.
Myron F. Converse	President, Worcester Five Cents Savings Bank, Worcester, Mass.
Allerton F. Brooks	President, Southern New England Telephone Company, New Haven, Conn.
Kent T. Healy	Professor of Transportation, Yale University.

Counsel.

Davis Polk Wardwell Sunderland & Kiendl
Edwin S. S. Sunderland
Judson C. McLester, Jr.
John E. Masten
Spencer Byard
James L. Homire
William D. Tucker, Jr.

Intervenors.

Party	Counsel
1. Insurance Group (James H. Brewster, Jr., Chairman, Harry C. Hagerty, Vice Chairman): Aetna Insurance Company, Aetna Life Insurance Company, The Equitable Life Assurance Society, *John Hancock Mutual Life Insurance Company, *Massachusetts Mutual Life Insurance Company, Metropolitan Life Insurance Company, *The Mutual Benefit Life Insurance Company, *The Mutual Life Insurance Company of New York, New England Mutual Life Insurance Company, New York Life Insurance Company, *The Phoenix Insurance Company, *The Prudential Insurance Company of America, State Mutual Life Assurance Company, The Travelers Insurance Company.	Davis Polk Wardwell Sunderland & Kiendl, Edwin S. S. Sunderland, Malcolm Fooshee, 1935-43, Judson C. McLester, 1943-47, John E. Masten, 1936-42; 1946-_____, Spencer Byard, 1943; 1946-____, James L. Homire, 1945-____, William D. Tucker, Jr., 1945-____, New York, N. Y. Day, Berry & Howard, Edward M. Day, Hartford, Conn.
2. City Bank Farmers Trust Co., Trustee of Central New England Ry. Co. First Mortgage	Mitchell, Taylor, Capron & Marsh, John B. Marsh, Edward E. Watts, New York, N. Y.
3. Rhode Island Hospital Trust Co., Trustee of Providence Terminal Co. First Mtge.	Tillinghast, Collins & Tanner, Harold E. Staples, Providence, R. I.

* Companies marked with an asterisk liquidated their New Haven investments during the war period and withdrew from the Group.

	Party	Counsel
4.	Treasurer of State of Connecticut, Trustee of Boston & N. Y. Air Line R. R. Co. First Mortgage, N. Y., Providence & Boston R. R. Co. General Mortgage, Naugatuck R. R. Co. First Mtge., Housatonic R. R. Co. First Mtge., New Haven & Northampton R. R. Co. Consolidated Mtge., Danbury & Norwalk R. R. Co. First Mtge., and Stafford Springs Street Ry. Co. First Mtge.	Attorney-General of Connecticut Charles J. McLaughlin
5.	United States Trust Co., Trustee of Harlem River & Port Chester R. R. Co. First Mtge.	Stewart & Shearer, M'Cready Sykes, New York, N. Y.
6.	Irving Trust Company, Trustee of N. Y., N. H. & H. R. R. Co. 15 Yr. Secured 6% Gold Bonds	Davies, Auerbach, Cornell & Hardy, Harold C. McCollom, New York, N. Y.
7.	Jean Annett, Contract Creditor	Parmalee & Thompson, Curtiss K. Thompson, New Haven, Conn.
8.	Old Colony Trust Company, Trustee of Old Colony R. R. Co. First Mtge.	Bingham, Dana & Gould, Charles J. Winkler, Jr., Boston, Mass.
9.	Protective Committee of Stockholders of Old Colony R. R. Co.	Palmer, Dodge, Barstow, Wilkins & Davis, Robert G. Dodge, Boston, Mass.
10.	Boston & Providence R. R. Co.	Bentley W. Warren
11.	Bank of New York, Trustee of New England R. R. Co. Consolidated Mortgage	Root, Ballantine, Harlan, Bushby & Palmer, William P. Palmer, New York, N. Y.
12.	New York Trust Company, Trustee of Worcester & Conn. Eastern Ry. Co. First Mtge.	Willkie, Owen, Farr, Gallagher & Walton, Edward C. Bailey, New York, N. Y.

Party	Counsel
13. Bankers Trust Co. of N. Y., First & Refunding Mtge. Trustee	White & Case, Joseph M. Hartfield, Fitzhugh McGrew, Jesse E. Waid, New York, N. Y.
14. Mutual Savings Bank Group Committee*: Myron F. Converse, Chairman Theron A. Apollonio John W. B. Brand Charles F. Mann Thomas W. Murray Robert C. Glazier George H. Woods Charles A. Post	Oliver & Donnally, Fred N. Oliver, Willard P. Scott, New York, N. Y.
15. United Gas Improvement Co., Edward B. Aldrich, Abby Aldrich Rockefeller, and Winthrop W. Aldrich, Security Holders	Hinckley, Allen, Tillinghast & Wheeler, Frederick W. Tillinghast, Providence, R. I.
16. Committee of Banks Holding Collateral Notes of New Haven	Mudge, Stern, Williams & Tucker, Paul D. Miller, New York, N. Y.
17. Protective Committee for Holders of New Haven Preferred Stock	Franklin E. Parker, Jr., New York, N. Y.
18. Protective Committee for Holders of Housatonic R. R. Co. Bonds	Greenbaum, Wolf & Ernst, New York, N. Y.
19. Trustees of Boston & Providence R. R. Co.	Paul E. Troy, John Noble, Jr., Boston, Mass.
20. Protective Committee for Holders of Harlem River & Port Chester R. R. Co. Bonds	Malcolm Donald, Boston, Mass.

* The Committee represented 229 New England Savings Banks. On most occasions, Myron F. Converse of the Worcester Five Cents Savings Bank spoke for the Committee.

Party	Counsel
21. Old Colony R. R. Co., First National Bank of Boston, Trustee of New York & New England R. R. Co. Boston Terminal First Mtge.	Ropes, Gray, Best, Coolidge & Rugg, Charles A. Coolidge, Charles B. Rugg, Boston, Mass.
22. Old Colony Trust Company, Trustee of Boston Terminal Co. First Mtge. Webster & Atlas National Bank, Successor Trustee of Boston Terminal Co. First Mtge.	Hausserman, Davison & Shattuck, Robert H. Davison, Boston, Mass.
23. Protective Committee for Holders of Boston & N. Y. Air Line R. R. Co. First Mtge. Bonds	Beckwith & Van Slyck, Edmund Ruffin Beckwith, New York, N. Y.
24. Empire Trust Company, Holder of N. Y., Westchester & Boston R. R. Co. Bonds	Tanzer & Mullaney, New York, N. Y.
25. Protective Committee for Holders of Old Colony Bonds	Ely, Bradford, Thompson & Brown, Joseph B. Ely, Richard E. Ely, Boston, Mass.
26. Mutual Savings Bank Group Holding, Boston Terminal Co. Bonds	Hurlburt, Jones, Hall & Bickford, Rutherford E. Smith, Damon E. Hall, Boston, Mass.
27. Institutional Group Holding Boston Terminal Co. Bonds	Hunton, Williams, Anderson, Gay & Moore, Henry W. Anderson, Richmond, Va.
28. City of Boston	Corporation Counsel, Robert H. Hopkins.
29. Commonwealth of Massachusetts	Clarence A. Barnes, Attorney General.

Party	Counsel
30. Boston Port Authority	Henry E. Foley, Boston, Mass.
31. Protective Committee for Holders of New Haven Common Stock	John W. MacGregor, New York, N. Y.
32. Independent Bondholders' Committee	Hays, St. John, Abramson & Shulman, Arthur Garfield Hays, New York, N. Y.
33. Connecticut Ry. & Lighting Co.	Emmet, Marvin & Martin, George W. Martin, New York, N. Y.
34. Providence & Worcester R. R. Co.	Edwards & Angell, Walter W. Edwards, Providence, R. I.
35. State Street Trust Co.	Peabody, Arnold, Batchelder & Luther, Willard B. Luther, Boston, Mass.
36. Merchants National Bank of Boston	Peabody, Brown, Rowley & Storey, Howard W. Brown, Boston, Mass.
37. Pennsylvania R. R. Co.	Drinker, Biddle & Reath, Henry S. Drinker, Philadelphia, Pa.
38. Reconstruction Finance Corporation	W. Meade Fletcher, Washington, D. C.
39. Insurance Group Holding N. Y., West. & Boston Ry. Co. 1st Mtge. Bonds	Milbank, Tweed, Hope & Hadley, Edgar P. Baker, New York, N. Y.

APPENDIX B.

COURT DECISIONS AND INTERSTATE COMMERCE COMMISSION REPORTS IN THE NEW HAVEN PROCEEDING.

Supreme Court and Circuit Court of Appeals Decisions.

1938

In re N. Y., N. H. & Hartford R. R. Co., Claim of Connecticut Ry. & Lighting Co., 95 F. (2d) 483 (1938).
Old Colony Railroad Co. v. *New York, New Haven & Hartford Railroad Co.*, 98 F. (2d) 670 (1938).

1939

Connecticut Railway & Lighting Co. v. *Palmer*, 305 U. S. 493 (1939).
In re New York, New Haven & Hartford R. R., 102 F. (2d) 923 (1939).
New York Trust Company v. *Palmer*, 101 F. (2d) 1 (1939).
Palmer v. *Palmer*, 104 F. (2d) 161 (1939), cert. denied 308 U. S. 590 (1939).
Palmer v. *Palmer*, 305 U. S. 578 (1939).
Palmer v. *Massachusetts*, 308 U. S. 79 (1939).
Merchants National Bank of Boston v. *N. Y., N. H. & H. R. R. Co.*, 102 F. (2d) 923 (1939).
Converse et al. v. *Commonwealth of Mass.*, 101 F. (2d) 48 (1939).

1940

Connecticut Railway & Lighting Co. v. *Palmer*, 109 F. (2d) 568 (1940).
Warren v. *Palmer*, 310 U. S. 132 (1940).
Palmer et al. v. *Warren et al.*, 108 F. (2d) 164 (1940).
Webster & Atlas National Bank of Boston v. *Palmer*, 111 F. (2d) 215 (1940).
Bankers Trust Co. v. *Palmer*, 109 F. (2d) 136 (1940).

1941

Palmer v. *Webster & Atlas Bank*, 312 U. S. 156 (1941), rehearing denied 312 U. S. 714 (1941).
Palmer v. *Connecticut Railway & Lighting Co.*, 311 U. S. 544 (1941).

1945

In re N. Y., N. H. & Hartford Railroad Co., 147 F. (2d) 40, 53 (1945).
In re N. Y., N. H. & Hartford Railroad Co., 150 F. (2d) 169 (1945).
Chapin et al., v. *N. Y., N. H. & H. R. R. Co.*, 325 U. S. 884 (1945).
Commonwealth of Mass. v. *N. Y., N. H. & H. R. R. Co.*, 325 U. S. 884 (1945).

1947

Old Colony Bondholders et al. v. *N. Y., N. H. & H. R. R. Co.*, 161 F. (2d) 413 (1947); cert. den. 331 U. S. 859, rehearing denied October 20, 1947, 90 Law. ed. 40.

District Court Decisions.

1941

In re New York, New Haven & Hartford R. R., unreported, decided December 8, 1941; District Ct. Record, p. 8923.

1943

In re New York, New Haven & Hartford R. R., 54 F. Supp. 595 (1943).

1944

In re New York, New Haven & Hartford R. R., 54 F. Supp. 631 (1944).

1945

In re New York, New Haven & Hartford R. R., unreported, decided August 31, 1945; District Ct. Record, p. 11891.

In re New York, New Haven & Hartford R. R., unreported, decided December 14, 1945; District Ct. Record, p. 12104.

Interstate Commerce Commission Reports.

1938

New York, New Haven & Hartford R. R. Reorganization (Segregation Formula), 224 I. C. C. 723 (1938).

New York, New Haven & Hartford R. R. Reorganization, Proposed Report of Examiner Wilkinson, dated June 11, 1938, I. C. C. Finance Docket 10992.

1939

New York, New Haven & Hartford R. R. Reorganization, Proposed Report of Examiner Wilkinson, dated November 17, 1939, I. C. C. Finance Docket 10992.

1940

New York, New Haven & Hartford R. R. Reorganization, 239 I. C. C. 337 (1940) (Report and Order of March 22, 1940, of Division 4 of the Commission).

1941

New York, New Haven & Hartford R. R. Reorganization, 244 I. C. C. 239 (1941) (Supplemental Report and Order of February 18, 1941, of the Commission).

Old Colony Railroad Co. et al., Trustees Abandonment, 244 I. C. C. 303.

New York, New Haven & Hartford R. R. Reorganization, 244 I. C. C. 521 (1941) (Supplemental Report and Order of March 25, 1941, of the Commission).

1942

New York, New Haven & Hartford R. R. Reorganization, 254 I. C. C. 63 (1942) (Third Supplemental Report and Order of October 6, 1942, of the Commission).

1943

New York, New Haven & Hartford R. R. Reorganization, 254 I. C. C. 405 (1943) (Fourth Supplemental Report and Order of July 13, 1943, of the Commission).

1944

New York, New Haven & Hartford R. R. Reorganization, 257 I. C. C. 9 (1944) (Fifth Supplemental Report and Order of February 8, 1944), of the Commission).

1945

New York, New Haven & Hartford R. R. Reorganization, 261 I. C. C. 195 (1945) (Sixth Supplemental Report and Order of May 14, 1945, of the Commission).

APPENDIX C.

NOTES TO PREFACE

NOTE 1—The Compromise Plan in the St. Louis-San Francisco Railroad Reorganization.

The reorganization of St. Louis-San Francisco Railway Company (District Court of the United States for the Eastern District of Missouri, Eastern Division, No. 7004) furnishes an instance of the acceptance of a Plan through a compromise agreed to by the three major Bondholders' Committees* and the representatives of Reconstruction Finance Corporation and Railroad Credit Corporation.

In that proceeding the segregation formula was applied under the direction of the Bankruptcy Trustees in accordance with the principles recommended by the experts representing the three Committees. It presented many complex questions which could have been litigated at length. There were also disputed legal problems with respect to the liens of certain of the mortgages on valuable equipment, which were resolved in the Plan. Another very difficult problem which was adjusted was the claim of the Reconstruction Finance Corporation and the Railroad Credit Corporation to priority over the mortgages. The Commission had sustained such a priority, the District Court had rejected the proposition, and at the time the over-all compromise was made the matter was on appeal before the Circuit Court of Appeals for the Eighth Circuit.

After purchase at a discount as a result of the compromise of the RFC and RCC claims by the Bankruptcy Trustees of the Frisco, the Committees, with their experts and counsel, through their reorganization Plan, effected the necessary adjustments, and agreed to the distribution of securities and cash, and the purchase of underlying liens. The plan which was submitted to the Commission was one which took into consideration all of the claims and defenses. As the Commission's Report of July 4, 1944, indicates, the three Committees filed a joint plan. The Commission's Report further states that the only opposition to the Plan of the three Committees, or any of its provisions, was presented by the Debtor upon the ground that no securities were allotted to the old stock. This Report of the Commission states that "Except for matters of mere order or arrangement, the bondholders' plan differs so little from the plan approved herein, and set forth at length in the order entered herewith, that reference will be made in this report only to those provisions in which it differs from the plan we shall approve, and to those provisions which, although approved, appear to require discussion."

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* The three Committees acted under the chairmanship of James H. Brewster, Jr., of Aetna Life Insurance Company, Frederick H. Ecker, of Metropolitan Life Insurance Company, and John W. Stedman, of Prudential Life Insurance Company of America, respectively, and were represented, in the order indicated, by Davis Polk Wardwell Sunderland & Kiendl of New York, by Cravath, Swaine & Moore of New York, and by Hunton, Williams, Anderson, Gay & Moore, of Richmond, Virginia. Mr. Jesse H. Jones, Secretary of Commerce and Chairman of Reconstruction Finance Corporation, and Mr. Frank C. Wright, and Mr. Edward G. Buckland of Railroad Credit Corporation, were in charge of the negotiations on behalf of the RFC and the RCC.

This case presents a striking illustration of the adjustment of divergent views and the reaching of several important compromises which enabled and expedited the consummation of a Plan of Reorganization which received the full support of the Committees, and the approval of the Interstate Commerce Commission and the federal courts, including the Supreme Court.

NOTE 2—The Achievements of Compromise in the Seaboard Air Line Railway Equity Receivership Reorganization Proceedings.

Due to various causes, primarily economic, no attempt had been made to formulate a plan of reorganization for the Seaboard during the first six years of the receivership. Toward the end of 1936 Judge Luther B. Way called a conference to be held in his chambers early in 1937 for the purpose of canvassing the possibility of reconciling divergent views and hastening the work of reorganization. An extended conference was accordingly held and many parties participated. There was a full exchange of opinion which brought out some considerable differences in the respective approaches of various interests. At that conference Mr. Edwin S. S. Sunderland, representing the Consolidated Mortgage Trustee, Guaranty Trust Company of New York* was one of those who took the position that the time probably was ripe for serious and concerted efforts through a committee representing security holders acting in cooperation with the Receivers. Judge Way apparently was of the same mind for he said (RR, p. 11717):

> "The suggestion made by Mr. Sunderland is more in line with what the Court had in mind, namely, utilizing the experience and knowledge of its Receivers and their counsel with respect of these matters in conjunction with a committee which, if selected, should be as nearly representative as it is possible to have one, of all the thirty or more conflicting interests. Whether it is practicable or humanly possible to obtain such an impartial committee, I cannot now decide."

However, no such committee was then formed. It was not until October of 1939 that the work had so far progressed that a first attempt could be made to solve disputes and frame a plan through a reference to a Special Master. Accordingly, in October 1939 the Court appointed a Special Master for that purpose who undertook the preparation of a comprehensive plan of reorganization. His plan was contained in a report which he submitted to the Court to be confirmed.

When the report of the Special Master came on for confirmation before the Court,** it developed that there was still a good deal of opposition to it, and that there was still considerable conflict of interest between the Committee representing the underlying bonds and the Committee representing the Consolidated Bonds. It also appeared that this diversity of interest still extended to the segregation formulae and that a good deal of litigation, or of negotiation, had to be done before a final plan could be arrived at. In this situation the Court considered it highly desirable to see if the difficulties could not be satisfactorily worked out by compromise, and, accordingly, he appointed a Compromise Committee consisting of

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* Guaranty Trust Company had filed the original bill of complaint in this proceeding in the interest of the Consolidated Bondholders.

** Judge Way died in 1943 and Hon. W. Calvin Chestnut was appointed as his successor.

Mr. Sunderland as Chairman, Mr. Joseph France, of Baltimore, Maryland, and Mr. Delano Andrews of Sullivan & Cromwell, of New York, N. Y.

This Compromise Committee, after extended conferences and debate, conducted in a spirit of cooperation and give and take, made many modifications in the plan as submitted by the Special Master, and arrived at a point where there was a substantial agreement. The plan which was finally confirmed and which served as the basis of the Decree, was essentially the plan as devised by the members of the Compromise, or Court, Committee and submitted to the Court with their recommendations. Such opposition as still remained to the plan so revised and submitted by the Compromise Committee, and as approved by the Court, was overruled by the Court both in Virginia and in Florida. Subsequently the orders confirming the plan were affirmed by the Circuit Court of Appeals for the Fourth Circuit and by the Circuit Court of Appeals for the Fifth Circuit, and petitions for writs of certiorari filed with the Supreme Court were denied. The reorganization ultimately to be achieved was established on that plan, which was the product of business-like agreement among the controlling parties under the supervision of the Court.

NOTE 3—The activities of the Advisory Committee to the Bankruptcy Trustee, in working out to a helpful degree on a compromise basis the terms of the Trustees' Plan of Reorganization in the Reorganization Proceedings of the Central of Georgia Railway Company.

Although Central of Georgia Railway Company went into receivership on December 19, 1932, its earnings during the depression years were such that there was no possibility of early reorganization.

Under date of June 18, 1940, the Company petitioned to be adjudged a bankrupt and for reorganization under Section 77 of the Bankruptcy Act and by order dated June 19, 1940, the petition was granted. Pending the appointment and qualification of trustees, Mr. H. D. Pollard was directed by the Court to hold possession as Receiver and did so until September 1, 1940. Mr. Pollard and Mr. A. B. Lovett were appointed Trustees and took over the property on September 1, 1940.

Guaranty Trust Company of New York, of which Mr. Merrel P. Callaway had long been Vice President in charge of the Trust Department, had petitioned for and been granted permission at the beginning of the proceeding to intervene as Trustee under the Central of Georgia's First Mortgage and three other mortgages. Mr. Lovett became a District Judge and Mr. Pollard died on January 7, 1942. On November 8, 1941, Mr. Callaway, having retired from Guaranty Trust Company of New York, was appointed Trustee and his appointment was ratified by the Interstate Commerce Commission on January 10, 1942, from which time he served as sole Trustee. Thereafter, Guaranty Trust Company of New York resigned as Trustee under the four mortgages which it had been representing.

Shortly after his appointment as Trustee in Bankruptcy, Mr. Callaway retained Davis Polk Wardwell Sunderland & Kiendl of New York City to advise him in connection with the studies that would be necessary in order to support an appropriate plan of reorganization. After preparation thereof in accord with the advice of Mr. Sunderland, these studies were available at hearings which were held in the latter part of 1942 on various problems in the proceedings and were available prior to the statement

of Judge Lovett, who was then in charge of the proceeding, at a hearing held on December 1, 1942, that he would direct the Trustee to prepare a plan of reorganization. Mr. Callaway, relying on his long familiarity with reorganizations and in accordance with Mr. Sunderland's advice, recommended to the Court that there be appointed an Advisory Committee to advise and cooperate with him in his preparation of a plan of reorganization. The Court adopted this suggestion and requested that nominations be made by the principal interests in the proceedings and a Committee of five was appointed by the Court. The Committee consisted of:

Name:	Representing:
Harry C. Hagerty, Vice President and Treasurer, Metropolitan Life Insurance Co., New York, N. Y.	Refunding and General Mortgage Bondholders
Francis T. P. Plimpton, Debevoise, Plimpton & McLean, New York, N. Y.	First Mortgage Bondholders
R. Gregory Page, Vice President, Bankers Trust Company, New York, N. Y.	Consolidated Mortgage Bondholders
William Murphey, Vice Chairman, The Citizens and Southern National Bank, Savannah, Ga.	Divisional Mortgages
Frank C. Wright, Special Adviser to Reconstruction Finance Corporation, New York, N. Y.	Reconstruction Finance Corporation

Following the Court's direction to the Trustee, his counsel intensively worked on the preparation of an outline of an appropriate plan of reorganization which, when substantially agreed upon by the Trustee and his above mentioned New York counsel, together with his general counsel, Mr. T. Mayhew Cunningham, was reduced to a completed document and became the subject of conferences with the Advisory Committee. Certain proposals were made to accommodate the views of the different members of the Advisory Committee and the plan, after certain revisions, was filed under date of January 28, 1944.

While the members of the Advisory Committee were not committed to the exact provisions for the plan and made reservations to that effect, and while the representatives of the First Mortgage Bonds and the Consolidated Mortgage Bonds and certain other interests later criticised certain provisions of the Plan, the Interstate Commerce Commission Examiner, and later Division 4 of the Commission, in promulgating a plan followed almost entirely the Trustees' plan. The original order of the Commission was dated July 13, 1945. It was amended in certain respects by an order of the Commission dated November 6, 1945, and the Plan was approved by the Court in an order dated June 2, 1946. It was submitted by the Commission on February 11, 1947, to the security holders for their approval or disapproval by March 28, 1947. It was certified by the Court to the Commission on April 15, 1947, and the Court confirmed the Plan on July 12, 1947.

It is the view of the draftsmen of the Plan that the method in which it was prepared by the Trustee and his counsel, in consultation with the members of the Advisory Committee resulted in a noticeable shortening of the period of time required for the reorganization. Without the forma-

tion and cooperation of the Advisory Committee it is doubtful if this end would have been attained.

NOTE 4—Treatment of the Equity Securities and the Compromise Agreement in the Erie Railroad Reorganization.

In the Erie proceeding, Mr. Herbert A. Taylor, Vice President and General Counsel, became counsel for the Trustees in Bankruptcy and Davis Polk Wardwell Sunderland & Kiendl, which had been for many years the Erie's New York counsel, was retained by the Debtor to advise it concerning the fundamental studies constituting bases for a new capital structure and for the distribution of new securities, and to prepare a Plan of Reorganization. The Debtor promptly appointed a Reorganization Committee of its officers, with Mr. John K. Thompson as its Chairman. Mr. Thompson was Vice President of the Erie and entirely familiar with the Erie corporate and financial structure. Mr. Edwin S. S. Sunderland and Mr. Chester F. Leonard, his principal associate, as counsel to the Debtor realized that the Erie was in a different category from all of the large railroads which were then being reorganized under Section 77, principally in two respects, first, because there was an equity in the old Erie Preferred and Common Stocks and, secondly, because the Erie needed a substantial simplification of its corporate structure which bankruptcy afforded a good opportunity to accomplish. As to the first difference, the Erie's earnings had weathered the worst part of the storm in the depression years after 1929 and the Erie had been forced into bankruptcy when, because of the exceptionally sharp business recession in the latter months of 1937, its earnings fell away rapidly and the January 1, 1938 bond maturities were put in jeopardy because of the failure to secure expected short-term financing. Counsel recognized that Erie was a stronger road financially than substantially all of the other roads then in reorganization and that treatment of its old stock should be different and the Reorganization Committee concurred in this view, as did the Commission and Court later.

With respect to the second difference, the Erie System consisted of about fifty companies, some of which were wholly-owned, some of which were partly-owned and some of which were not at all owned, but were operated either under lease or otherwise. Counsel advised the Reorganization Committee that in order to determine what portion of the prospective earnings would be available for fixed charges, contingent interest and dividends, it was necessary and desirable to eliminate any leases which would be disaffirmed by the Trustees or which ought to be disaffirmed by the Trustees or the Plan, and to consider also the merger and consolidation problem. Accordingly, Mr. Thompson was advised to, and he undertook, the necessary studies, including the preparation of formulae which would serve as the basis for the determinations of the treatment to be accorded to the leased lines and the various subsidiary and affiliated companies as well as to assist in determining the proper allocations to the various claimants. Counsel, recognizing Mr. Thompson's ability and familiarity with accounting and financial matters, recommended that he prepare, with their assistance, a segregation formula for the Erie based upon the New Haven formula. Mr. Thompson accordingly did prepare a segregation formula, severance studies for various sections of the system shown to be desirable by the segregation formula, and collected the necessary valuation and similar data to be presented in support of any plan. These studies were eventually put in evidence before the Interstate Commerce Commission by Mr. Sunderland through Mr. Thompson.

During the progress of the preparation of this data, counsel drafted a skeleton plan in which the elements constituting the system and the debt were described, and in which provision was made for showing the results of the studies as received, and later specific recommendations were made as to the particular companies whose leases should be disaffirmed and as to the particular companies which should, and the approximate terms on which they should, in the opinion of the drafters of the Plan, be merged, consolidated or otherwise put together in the new Company, the exact method being left to the Reorganization Managers. The second part of the Plan then ultimately contained a summary of the proposed capitalization, description of the new securities and the recommended treatment of, or allocation of the new securities to, the various claims.

At the end of the statutory six months period, the necessary studies had not been completed and an extension of time was secured for three months, and a further extension of two months was then granted by the Court to and including December 19, 1938, at which time the completed Plan of the Debtor was filed. The Debtor's Plan, as proposed, recommended a cut in the rent for leased roads and equipment from approximately $2,000,000 to $176,000, a 91% reduction, cut interest on funded debt from about $11,340,000 to about $6,300,000, a 45% reduction and interest on unfunded debt was eliminated. Total fixed charges of $14,372,000 were cut to $6,484,000 or a 55% reduction, which was not much above where they were finally fixed. In addition to its other provisions the Debtor's Plan provided that the holders of the old First Preferred, Second Preferred and Common Stock would have the right to receive for each share held, one share of new Common Stock either to be "no par value" or to have a $40 par value per share.

The Examiner's Proposed Report followed the Debtor's plan in that it made provision for the equity of one new share for each five old shares held (in addition to warrants). The Report was so satisfactory to the Debtor that it limited its filed objections to seven, of which some were relatively minor. Counsel accordingly recommended that Mr. Thompson negotiate with the Institutional Group for a compromise arrangement based upon the Report. Such negotiations took place and the Debtor and the Institutional Group and the Chesapeake & Ohio, as principal stockholder of the Erie, agreed in principle upon a compromise plan, consisting of the Examiner's plan as amended in the manner agreed upon. The main difference from the Examiner's plan was that additional income bonds were recommended and compromise provisions were worked out for the two main indenture provisions objected to by the Debtor. These provisions were a limitation provision as to the time within which the Debtor could draw down bonds and the time in which it could sell such bonds after they had been drawn down. The limits were substantially extended in the compromise provision. The other provision related to a covenant to preserve a conservative ratio between debt and stock and the Debtor secured an agreement that failure to comply with such covenant should not be a default under the mortgages. The compromise also resulted in providing that one of the Reorganization Managers should represent the old stock of the Debtor.

The principal terms of the compromise were embodied in a joint memorandum to Commissioner Porter signed by Mr. Edwin S. S. Sunderland and Mr. Chester F. Leonard, as counsel for the Debtor, by counsel for the Institutional Group and counsel for the Chesapeake & Ohio. The Commission's Report of April 6, 1940, without specifically saying so, adopted these

compromise suggestions and the Plan, as ultimately approved by security holders and confirmed, contained the compromise provisions, including provision for the old equity.

NOTE 5—The Compromise Arrangement in The Denver and Rio Grande Western Railroad Reorganization.

The Plan of Reorganization ultimately adopted in the Denver & Rio Grande Western proceedings* was also the definite result of the willingness of the important senior creditor interests to compromise their differences. When the Plan approved by the Commission was certified to the District Court for the latter's approval, the Reconstruction Finance Corporation, the Insurance Group, and others, filed objections to the Plan and claims for equitable treatment. The objections and claims were of such a character that long litigation with consequent delay in the consummation of the Plan would have resulted had not the parties, through their attorneys, met and after canvassing the various questions involved, agreed to adjust their differences. The conferences, therefore, brought about a compromise which took the form of an agreement among the parties in interest not to press their objections and claims so long as there would be expedition in consummating the reorganization, provided the Plan of Reorganization, as approved by the Commission, was confirmed and consummated with reasonable promptness.

As a result of this agreement from this point on, the controversy was narrowed chiefly to questions between the junior bond issues and the Debtor on the one hand, and the senior secured creditors on the other.

In view of the fact that there were no important Committees for the various individual issues, great responsibilities were thrown upon the Mortgage Trustees. These Trustees, including Guaranty Trust Company of New York, for whom Davis Polk Wardwell Sunderland & Kiendl were counsel, were faced, because of the complexity of the situation, with the fulfillment of their obligations under the mortgages and it was necessary for them to participate in all of the negotiations. In fact, Guaranty Trust Company of New York, which was Trustee of one of the issues, had to employ and pay out of its own pocket a large portion of the fees and expenses of an expert who prepared a detailed report and presented evidence before the Commission.

NOTE 6—Treatment of the Equity Securities in the Chicago Great Western Railroad Reorganization.

The petition in the Chicago Great Western reorganization was not filed until February 28, 1935, but it became the second major road to be reorganized under Section 77, largely due to the fact that some recognition was given to the equity. The capital structure was a very simple one, consisting of First Mortgage Bonds, Preferred Stock and Common Stock. In addition there were certain loans from governmental agencies. The Committee (known as the "Hagerty Committee") representing the First Mortgage Bonds, composed of Mr. Harry C. Hagerty, Vice President and Treasurer of the Metropolitan Life Insurance Company, as Chairman, Mr. Sterling Pierson of the Equitable Life Assurance Society, both of which companies held substantial amounts of bonds, and Mr. George M. Grinnell, a member of the firm of Dick & Merle Smith, was the dominating

* 254 ICC 349.

party in the proceeding. This Committee was represented by Davis Polk Wardwell Sunderland & Kiendl and Mr. Sunderland was the partner in charge of the case. The Debtor was represented by Messrs. Winston, Strawn and Shaw of Chicago.

Due to the extremely poor earnings of the road prior to and immediately after filing the petition, no progress could be made toward formulating a plan of reorganization until the Summer of 1936. It was apparent that fixed charges would have to be drastically cut and the most difficult problem was the manner in which the First Mortgage bondholders could be compensated for the right to fixed interest which they were called upon to surrender.

In the Summer of 1936 the Committee carried on extensive negotiations with the Debtor in an effort to arrive at an agreed plan. These negotiations failed since the Debtor would not recognize the right of the First Mortgage bondholders to compensation for the sacrifices they were called upon to make. The Debtor filed its own plan on September 29, 1936, which would have permitted participation by both the old Preferred and the Common Stocks through the issuance of one share of new Common for each share of old Preferred, and one share of new Common for each five shares of the old Common. The Committee filed a petition of objections to and proposals with respect to that plan. This petition was concerned principally with the compensation to be given the First Mortgage bondholders* and made no objection to the proposals of the Debtor's plan with respect to the treatment of the equity.

Hearings on the plan were commenced in December 1936 and concluded in October 1937. After the filing of briefs, the issuance of an Examiner's proposed report on January 25, 1938, and argument before Division 4, the Commission handed down its plan on August 4, 1938.** This plan was modified by the Commission on its own motion on April 17, 1939*** and certified to the District Court. The Examiner had proposed the elimination of the old Common Stock. In view of the fact that there were approximately $84.00 per share dividend arrears on the Preferred Stock, it seemed quite apparent that there was no equity for the Common Stock and the Committee supported the Examiner's proposal both before the Commission and at the hearings before the District Court which were held June 9, 1939.

No objection was raised by the Committee, however, to the provision in the Commission's plan which gave recognition to the claim of the Preferred stockholders by the issuance of one share of new Common Stock for each two shares of old Preferred. The District Court approved the Commission's plan on September 9, 1939.† After submission to the bondholders the plan was confirmed by the District Court March 26, 1940.‡ The Preferred stockholders did not appeal either from the District Court's order of approval or its order of confirmation and counsel for the Common stockholders, appreciating the hopelessness of the position of the Common

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* The First Mortgage Bonds bore interest at the rate of 4% and the compensation which the Committee sought, and which was ultimately contained in the plan, consisted of a 4½% interest rate on new Income Mortgage Bonds and a 5% dividend rate on the new Preferred Stock, both partially cumulative, which securities were to be issued in exchange for a portion of the First Mortgage bondholders' claim.

** 228 I. C. C. 585.

*** 333 I. C. C. 63.

† 29 F. Supp. 149.

‡ 32 F. Supp. 217.

Stock, asked the District Court for authority to withdraw from the cause, which authority was granted.

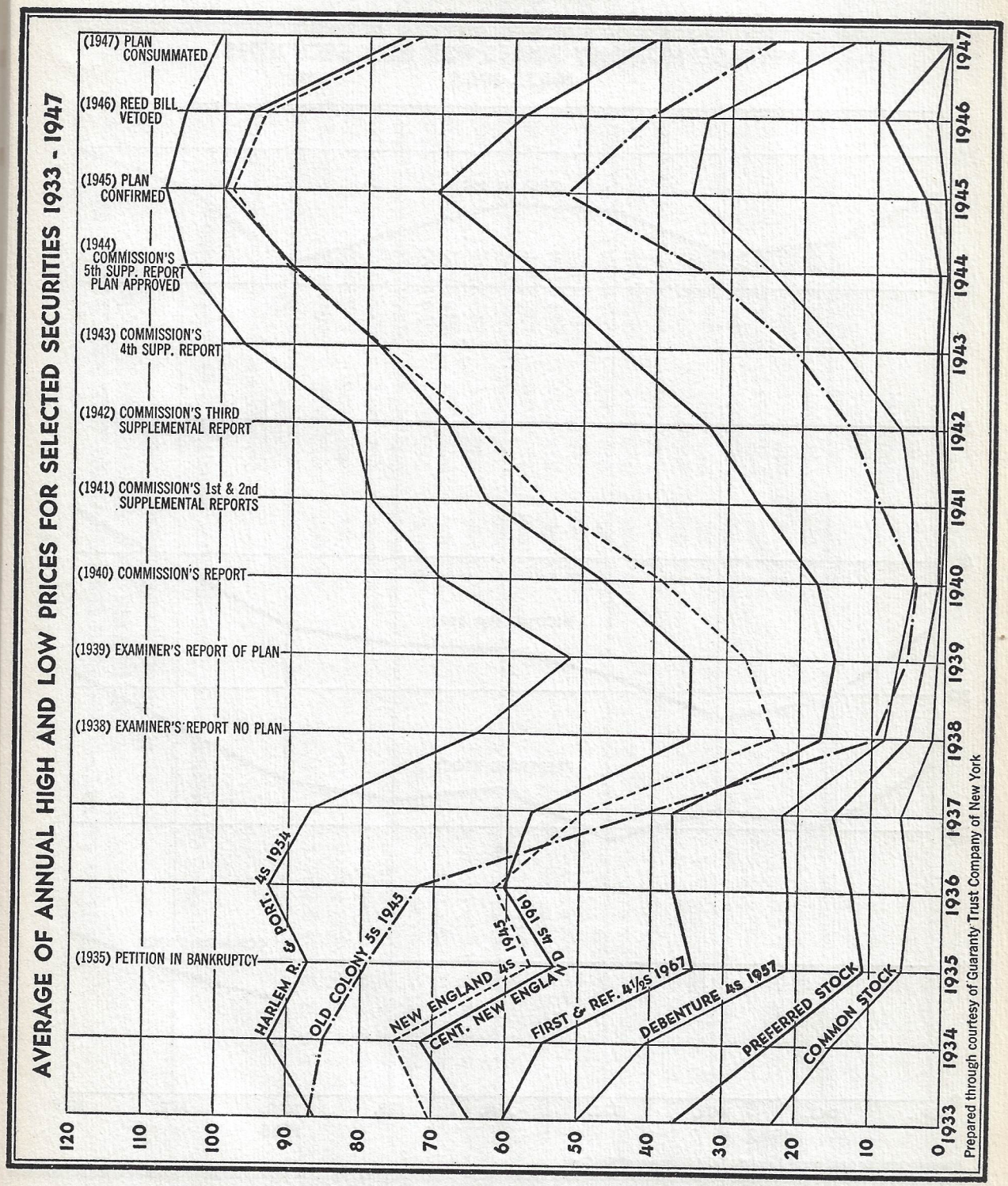
The action in the Chicago Great Western case recognizing the equity to the extent possible greatly expedited the reorganization and avoided the expensive and time consuming litigation which was experienced in a number of other reorganizations.

NOTE 7. The firm of Davis Polk Wardwell Sunderland & Kiendl, under its present name and under the name of Stetson, Jennings & Russell, had acted as counsel for Guaranty Trust Company of New York in many reorganization proceedings in equity in which precedents and formulae were developed that were very useful in the administration and reorganization of the New Haven. This firm represented Guaranty Trust Company of New York, which was corporate trustee of important mortgages, and actively participated in the equity receivership proceedings of the following railroads: *Chicago, Milwaukee & St. Paul* (1925), the *St. Louis-San Francisco* (1914), the *Missouri Pacific* (1915), the *Minneapolis & St. Louis* (1923), the *Norfolk & Southern* (1932), *Ulster & Delaware* (1931), the *Seaboard* (1930), the *Denver & Rio Grande* (1918), *Brooklyn Rapid Transit Company* (1918), *New York Railways* (1919) and *Interborough Rapid Transit Company* (1932). The firm also acted in other equity receivership proceedings looking toward the reorganization of insolvent railroads, including the proceedings for reorganization of the following railroads: *Missouri-Kansas-Texas* (1915), *Alabama Tennessee and Northern* (1915) and *Chicago and Alton* (1926).

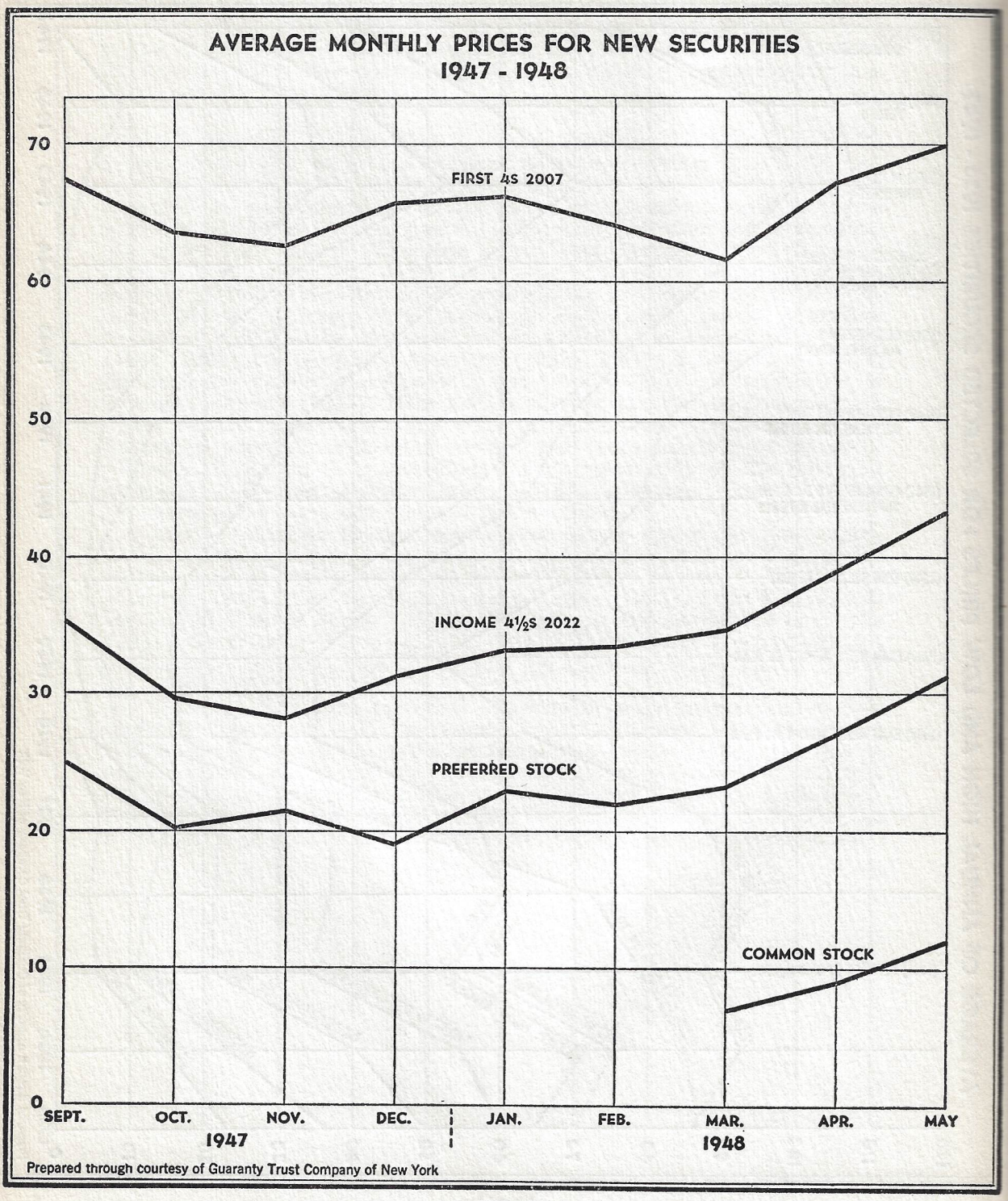
In the following reorganization proceedings under the Bankruptcy Act this firm represented Guaranty Trust Company of New York as intervenor and as trustee of important mortgages: *Denver & Rio Grande Western* (1935), the *Chicago & Eastern Illinois* (1933), *The Chicago, Milwaukee, St. Paul & Pacific* (1935), the *Chicago, Indianapolis & Louisville* (1933), the *Missouri Pacific* (1933), the *Chicago & North Western* (1935), the *St. Louis Southwestern* (1935) and the *Minneapolis, St. Paul & Saulte Ste. Marie* (1937).

The firm also acted for other interests in other reorganization proceedings under Section 77, representing the Equipment Trust Certificate Holders Committee in *Chicago Rock Island and Pacific* (1934), the Debtor in *Erie* (1938), the Bankruptcy Trustee in *Central of Georgia* (1942), the Fort Scott Bondholders Committee in *St. Louis-San Francisco* (1933), 5% Refunding Bondholders Committee in *Florida East Coast* (1931) and the First Mortgage Bondholders Committee in *Chicago Great Western* (1935).

APPENDIX D (1).


AVERAGE OF ANNUAL HIGH AND LOW PRICES FOR SELECTED SECURITIES 1933 - 1947
(1947) PLAN CONSUMMATED
(1946) REED BILL VETOED
(1945) PLAN CONFIRMED
(1944) COMMISSION'S 5th SUPP. REPORT PLAN APPROVED
(1943) COMMISSION'S 4th SUPP. REPORT
(1942) COMMISSION'S THIRD SUPPLEMENTAL REPORT
(1941) COMMISSION'S 1st & 2nd SUPPLEMENTAL REPORTS
(1940) COMMISSION'S REPORT
(1939) EXAMINER'S REPORT OF PLAN
(1938) EXAMINER'S REPORT NO PLAN
(1935) PETITION IN BANKRUPTCY
HARLEM R. & PORT. 4s 1954
OLD COLONY 5s 1945
NEW ENGLAND 4s 1945
CENT. NEW ENGLAND 4s 1961
FIRST & REF. 4½s 1967
DEBENTURE 4s 1957
PREFERRED STOCK
COMMON STOCK
120
110
100
90
80
70
60
50
40
30
20
10
0
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
Prepared through courtesy of Guaranty Trust Company of New York

APPENDIX D (2).


AVERAGE MONTHLY PRICES FOR NEW SECURITIES
1947 - 1948
70
60
50
40
30
20
10
0
FIRST 4s 2007
INCOME 4½s 2022
PREFERRED STOCK
COMMON STOCK
SEPT.
OCT.
NOV.
DEC.
JAN.
FEB.
MAR.
APR.
MAY
1947
1948
Prepared through courtesy of Guaranty Trust Company of New York

APPENDIX E.

TABLES SHOWING DISTRIBUTION OF CASH AND SECURITIES TO NEW HAVEN CREDITORS AND SECURITIES ASSUMED BY REORGANIZED COMPANY.

(1) Table of Distribution of Cash and New Securities to Secured Creditors.

	Cash and New Securities (per $1,000 Bond or Debenture)				
	Cash	First & Ref. Mortgage Bonds	Gen. Income Mortgage Bonds	Preferred Stock	Total
N. Y., N. H. & H. R. R. 1st & Ref. 4½'s 12/1/67	45.0000	350.6656	500.0853	265.4991	1161.2500
N. Y., N. H. & H. R. R. 1st & Ref. 6's 7/1/72	60.0000	361.2685	515.2062	273.5253	1210.0000
N. Y., N. H. & H. R. R. 4's Deb. 3/1/47	40.0000	343.4662	489.8186	260.0485	1133.3333
N. Y., N. H. & H. R. R. 3½'s Deb. 3/1/47	35.0000	339.8014	484.5917	257.2735	1116.6666
N. Y., N. H. & H. R. R. 6's Cv. Deb. 1/15/48	60.0000	360.4827	514.0855	272.9318	1207.5000
N. Y., N. H. & H. R. R. 3½'s Deb. 4/1/54	35.0000	338.8851	483.2852	256.5797	1113.7500
N. Y., N. H. & H. R. R. 4's Deb. 7/1/55	40.0000	345.5607	492.8053	261.6340	1140.0000
N. Y., N. H. & H. R. R. 3½'s Deb. Cert. 1/1/56	35.0000	341.6339	487.2052	258.6609	1122.5000
N. Y., N. H. & H. R. R. 4's Deb. 5/1/56	40.0000	347.6550	495.7919	263.2197	1146.6666
Danbury & Norwalk R. R. 1st Ref. 4's 6/1/55	14.4600	310.6514	443.0200	235.2029	1003.3343
Consolidated Rwy. 4's Deb. 7/1/54	40.0000	345.5607	492.8053	261.6340	1140.0000
Consolidated Rwy. 4's Deb. 1/1/55	40.0000	345.5607	492.8053	261.6340	1140.0000
Consolidated Rwy. 4's Deb. 4/1/55	40.0000	342.4194	488.3254	259.2552	1130.0000
Consolidated Rwy. 4's Deb. 1/1/56	40.0000	345.5607	492.8053	261.6340	1140.0000
Old Colony R. R. 1st Mtge. 4's 1/1/38	57.9937	267.4067	200.5550	----------	525.9554
Old Colony R. R. 1st Mtge. 5½'s A 2/1/44	57.9937	267.4067	200.5550	----------	525.9554
Old Colony R. R. 1st Mtge. 5's B 12/1/45	57.9937	267.4067	200.5550	----------	525.9554
Old Colony R. R. 1st Mtge. 4½'s C 7/1/50	57.9937	267.4067	200.5550	----------	525.9554
Old Colony R. R. 1st Mtge. 6's D 7/1/52	57.9937	267.4067	200.5550	----------	525.9554
Old Colony R. R. 1st Mtge. 6's E 7/1/53	57.9937	267.4067	200.5550	----------	525.9554
New Haven & Northampton Ref. Con. 4's 6/1/56	8.6771	781.1683	213.4879	----------	1003.3333
New England R. R. Con. 4's 7/1/45	----------	1000.0000	----------	----------	1000.0000
New England R. R. Con. 5's 7/1/45	----------	1000.0000	----------	----------	1000.0000
Central New England Rwy. 1st 4's 1/1/61	----------	1000.0000	----------	----------	1000.0000
Housatonic R. R. 50 Yr. Con. 5's 11/1/37	2.9212	1005.4122	----------	----------	1008.3334
Boston & N. Y. Air Line 1st 4's 50 Yr. 8/1/55	160.0000	----------	737.3414	579.3253	1476.6667

(2) Table of Initial Distribution of Common Stock to Holders of Allowed Unsecured Claims.

	Principal Amount of Bonds, Debentures or Number of Shares of Stock Exchangeable	Total Amount of Claim	Amount of Claim Allowed per $1,000. Bond, Debenture or per Share of Stock	Number of Shares of Common Stock Distributable per $1,000. Bond, Debenture or Share of Stock or per $1,000. of Allowed Claims not Represented by Securities
The New York, New Haven and Hartford Railroad Company, 4% Deb. due 5/1/57	$16,758,000.00	$17,078,745.00	$1,019.14	10.1914 Shares
The Providence Securities Company, 4% Deb. due 5/1/57				
New York, Westchester and Boston Railway Company, First Mtge. 4½% G/B, due 7/1/46	19,200,000.00	19,200,000.00	1,000.00	10.0000
The Stafford Springs Street Railway Company, 5% First Mortgage G/B due 7/1/56	312,207.77*	318,444.77	796.11	7.9611
The Worcester and Connecticut Eastern Railway Co., 4½% First Mtge. G/B due 1/1/43	247,540.95**	252,381.95	731.54	7.3154
Springfield Railway Companies, 1926—Preferred Shares	29,338 Shares	3,131,831.50	106.75	1.0675
New England Investment and Security Company, 1927—Preferred Shares	370 "	41,070.00	111.00	1.1100
Hartford and Connecticut Western Railroad Company, Common Stock	3,381 "	52,672.00	15.58	.1558
Providence, Warren and Bristol Railroad Company, Preferred Stock and Common Stock	449 "	22,450.00	50.00	.5000
Boston Railroad Holding Company, Preferred Stock	25,180 "	805,760.00	32.00	.3200
Holders of Allowed Unsecured Claims Not Represented by Securities	----------	6,013,371.79	----------	10.0000
Total		$46,916,727.01		

* $400,000 original principal amount.
** $345,000 original principal amount.

(3) Securities Assumed by Reorganized Company.

Naugatuck Railroad Company First Mortgage Four Per Cent Fifty Year Gold Bonds, Due May 1, 1954

The Harlem River and Port Chester Railroad Company First Mortgage Four Per Cent Fifty Year Gold Bonds, Due May 1, 1954

The New York and Stamford Railway Company First Mortgage Four Per Cent Fifty Year Gold Bonds, Due November 1, 1958

Providence Terminal Company First Mortgage Four Per Cent Fifty Year Gold Bonds, due March 1, 1956

The New York Connecting Railroad Company First Mortgage 2⅞% Bonds, Series B, Due October 1, 1975

The New York, New Haven and Hartford Railroad Company Fifteen Year Secured 6% Gold Bonds, Due April 1, 1940.

APPENDIX F

Important Dates in the New Haven Reorganization

1. Oct. 23, 1935—New Haven petition for reorganization filed in District Court. Printed Rec. p. 1, Vol. 1.
2. June 3, 1936—Old Colony petition for reorganization filed in District Court. Printed Rec. 731, Vol. 2.
3. June 1, 1937—Debtor's plan filed with the District Court.
4. June 11, 1938—Examiner's report recommending that, for the time being, no reorganization be attempted.
5. Dec. 31, 1938—Debtor's Amended Plan filed.
6. June 14, 1939—Commencement of hearings before the Interstate Commerce Commission on the Debtor's Amended Plan.
7. Nov. 17, 1939—Examiner's report on Debtor's Amended Plan.
8. Mar. 22, 1940—Report of Division 4 Interstate Commerce Commission (239 I. C. C. 337). Printed Rec. 7863, Vol. 12.
9. Feb. 18, 1941—First Supplemental Report of ICC (244 I. C. C. 239). Printed Rec. 8037, Vol. 12.
10. Mar. 25, 1941—Second Supplemental Report of ICC (244 I. C. C. 521). Printed Rec. 8115, Vol. 12.
11. Dec. 8, 1941—Decision of Judge Hincks on Second Supplemental Report. Printed Rec. 8923, Vol. 14.
12. Oct. 6, 1942—Third Supplemental Report of ICC (254 I. C. C. 63). Printed Rec. 9753, Vol. 15.
13. July 13, 1943—Fourth Supplemental Report of ICC (254 I. C. C. 405). Printed Rec. 10123, Vol. 15.
14. Dec. 21, 1943—Decision of Judge Hincks on Fourth Supplemental Report (54 Fed. Supp. 595). Printed Rec. 10695, Vol. 16.
15. Feb. 8, 1944—Fifth Supplemental Report of ICC (257 I. C. C. 9). Printed Rec. 10831, Vol. 16.
16. Mar. 6, 1944—Decision of Judge Hincks on Fifth Supplemental Report Approving the Plan (54 Fed. Supp. 631). Printed Rec. 11024, Vol. 17.
17. Dec. 29, 1944—Certificate of ICC re Voting on Plan. Printed Rec. 11509, Vol. 17.

18. Jan. 2, 1945—Decision of Circuit Court of Appeals for the Second Circuit on Plan (147 Fed. 2d 40). Printed Rec. 11525, Vol. 17.

19. Jan. 23, 1945—Decision of Circuit Court of Appeals on motions for modification of opinion on Plan. Printed Rec. 11563, Vol. 17.

20. Feb. 13, 1945—Old Colony provisions referred back to ICC. Printed Rec. 11582, Vol. 17.

21. May 14, 1945—Sixth Supplemental Report of ICC (261 I. C. C. 195). Printed Rec. 11682, Vol. 18.

22. June 18, 1945—Denial of Certiorari by the Supreme Court on Boston Terminal and Commonwealth appeals (325 U. S. 884).

23. Aug. 31, 1945—Decision of Judge Hincks on Sixth Supplemental Report. Printed Rec. 11891, Vol. 18.

24. Sept. 6, 1945—Order and decree of Judge Hincks confirming Plan contained in Fifth and Sixth Supplemental Reports. Printed Rec. 11922, Vol. 18.

25. Jan. 13, 1947—Decision of Circuit Court of Appeals Approving Plan (161 Fed. 2d 413). Printed Rec. 12655, Vol. 19.

26. June 23, 1947—Denial of Certiorari by the Supreme Court on Old Colony and Boston Terminal appeals (331 U. S. 859).

27. Aug. 4, 1947—Order of Judge Hincks fixing July 1, 1947 as the Effective Date. Printed Rec. 13201, Vol. 20.

28. Sept. 11, 1947—Entry of the Consummation Order and Final Decree. Printed Rec. 13245, Vol. 20.

29. Sept. 18, 1947—Consummation Date as Established by the Reorganization Committee.